

through leasing arrangements enabled educational institutions to fund the construction of stations and to develop educational programming. By comparison, our rules require direct broadcast satellite (DBS) licensees to reserve four percent of their channel capacity for use by qualified programmers for noncommercial programming of an educational or informational nature.” Thus, while ITFS retains both its historic nomenclature and a codified statement of purpose identifying the transmission of educational programming as its primary purpose, the required amount of educational programming carried on such stations in actuality may barely exceed the minimum proportion required for DBS. We seek comments from other licensees and lessees to determine whether that degree of consolidation is typical of the industry as a whole.

114. We note currently, for example, that the public may obtain educational programming by using the Internet to receive college courses as well as obtaining the services of for-profit corporations that provide educational programming. Education is becoming more popular over the Internet because the Internet’s ability to deliver media-rich content is improving rapidly. In 2002, approximately 2.2 million college students took courses over the Internet compared with 710,000 college students in 1998 – a 210% increase.²⁷⁶ These students chose from over 6,000 online courses delivered by eighty-four percent of four-year colleges and universities.²⁷⁷ These courses were accessible worldwide on the Internet to a rapidly expanding pool of users with sufficient connections. Already, more than twenty-eight percent of U.S. online households have broadband connections to the Internet; by one estimate, the number of broadband users experienced a nine percent average monthly growth rate between February 2000 and June 2002.²⁷⁸ On the other hand, some educational institutions, especially those in rural areas and those with less economic resources, do not utilize broadband. We seek comment on what ITFS enables educators to achieve that the Internet could not. What role does educational broadcasting in other bands play? Finally, we seek comment from educators on whether commercial programming is able to fulfill some of these needs. We seek comment on whether continuing to restrict the eligibility for ITFS spectrum is in the public interest or whether maintaining educational responsibilities remains in the public interest.

115. Although we perceive that significant developments have occurred since the last examination of the ITFS eligibility restriction, retention of the restriction could be detrimental to the growth of services on the ITFS channels. The complexity of the contractual relationships that our rules require in the ITFS service may discourage investment and impair the ability of service providers to modify their operations in response to changing technology and market conditions. For example, an MMDS operator who wants to change from providing one-way, high-powered television transmission operations from a single tower to providing two-way Internet access from multiple low-powered base stations, it must gain the consent of the ITFS operators in the market, even though the MMDS operator may already have a leasing agreement with the ITFS licensee. Innovation could proceed more smoothly if commercial operators were able to aggregate spectrum in the 2500-2690 MHz band and purchase ITFS stations, which would allow them to exercise direct ownership control.

²⁷⁵ See 47 C.F.R. § 100.5.

²⁷⁶ Jared Bleak, *Educated by the Market: A Researcher’s Look at Educational Entrepreneurialism* (Harvard Graduate School of Education, Oct. 5, 2001) <http://www.gse.harvard.edu/news/features/market10052001.html>.

²⁷⁷ *Id.*

²⁷⁸ *Broadband Increases Household Penetration, Silicon Valley/San Jose Business Journal*, Nov. 13, 2002, citing a Gartner Dataquest survey of 45,000 U.S. households. The article is accessible online at the following World Wide Web address: (<http://sanjose.bizjournals.com/sanjose/stories/2002/11/11/daily39.html>).

116. In light of these developments, we seek comment on various options relating to the ITFS service. We emphasize that we do not contemplate reclaiming licenses from any incumbent licensees, so long as they comply with any revised technical, service or other rules that we adopt for this band. We realize that if the FCC provides existing ITFS and MDS licensees with greater flexibility, those licensees may capture the increased value given that they could not have paid for that value when they obtained their original license. Accordingly, we seek comment on whether allowing these licensees to capture such value is in the public interest on balance with having this spectrum underutilized? If not, what other approach would parties recommend the FCC implement to ensure efficient use of the MMDS and ITFS spectrum? We request comment on combining the MMDS and ITFS services into a new Broadband Radio Service with requirements similar to those that apply now to MMDS, *i.e.*, open eligibility and no educational programming requirement. Additionally, we seek comment on maintaining ITFS as a separate service requiring educational programming but modifying the eligibility requirements to allow for-profit companies to be eligible licensees. Furthermore, we invite comment on whether or not we should eliminate or otherwise change our existing ITFS instructional content origination rules. We note, for example, that one such change could be to apply to ITFS channels public interest obligations comparable to those that apply to DBS under Section 100.5 of our rules.²⁷⁹ We also ask commenters to suggest alternative changes to ITFS that will result in robust services to the public.²⁸⁰ We also seek comment on whether data services can meet the ITFS programming requirement. While we note that these educational requirements were developed in a video context, we recognize that data service, *i.e.*, high speed internet data connections may be useful to educational institutions. Moreover, we seek comment on what kind of requirements should be required of ITFS licensees providing data services. We believe that there is a public interest benefit in promoting data services in this context particularly given that they do not consume as much spectrum as video and may be more useful than a minimal amount of video programming. Commenters may also believe that educational requirements for ITFS remains important, and that the Commission should find ways of promoting more use of the spectrum for educational purposes. We also seek comment on requiring a higher percentage of educational use for new ITFS licensees, such as twenty-five percent which was advocated by the ITFS community in the past. Finally we seek comment on other ways the Commission can strengthen the public interest in spectrum-based services for educational institutions?

117. To the extent that commercial or noncommercial MDS or ITFS operators may prefer to continue leasing channel capacity from others, we do not propose to prevent licensees from entering into new lease arrangements. ITFS licensees, to the same extent as MDS licensees, may assign their underlying license rights to commercial lessees or to others. In general, we prefer to let the markets determine the outcome of such arrangements without imposing limits, unless specific reasons justify a contrary policy. As a result, we seek comment on whether there are any circumstances under which we should restrict or require leasing in order to ensure that access to spectrum is not unduly limited.

118. We propose to relieve ITFS operators of the burden of filing copies of every channel lease agreement with the Commission. While the Commission never codified these requirements, they

²⁷⁹ As noted in para. 113, *supra*, DBS operators must reserve four percent of their channel capacity for use by qualified programmers for noncommercial programming of an educational or informational nature. *See* 41 C.F.R. § 100.5.

²⁸⁰ Presumably, licensees in the new Broadband Radio Service or ITFS licensees under the revised eligibility requirements would be eligible for **CARS** licenses, as MDS licensees currently are, but only to the extent they carry video programming—broadband data is not a permissible use for **CARS** stations.

were enunciated from time to time in various orders?” We propose to eliminate such requirements, with the proviso that licensees retain copies of channel lease agreements in their files and make them available to the Commission upon request. We seek comment on these proposals and the utility of retaining the ITFS eligibility restriction.

8. Other Eligibility Restrictions

119. Eligibility issues relevant to this proceeding are addressed in Sections 309(j), 257, and 613(a) of the Telecommunications Act of 1996. When granting the Commission authority in Section 309(j) of the Act to auction wireless spectrum, Congress acknowledged our authority to “[specify] eligibility and other characteristics of such licenses.”²⁸² However, Congress specifically directed the Commission to exercise that authority so as to “promot[e] . . . economic opportunity and competition.”²⁸³ Congress also emphasized this pro-competitive policy in Section 257, where it articulated a “national policy” in favor of “vigorous economic competition” and the elimination of barriers to market entry by a new generation of telecommunications providers.²⁸⁴ Section 613(a) also prohibits a cable operator from holding an MMDS license in any portion of the franchise area served by that cable operator’s system.²⁸⁵ The intent was to encourage entry of alternative providers of multichannel video service into markets dominated by incumbent cable systems in order to spur competition.²⁸⁶ The cross-ownership restriction addressed Congress’ concern that common ownership of different means of video distribution may reduce competition and limit the diversity of voices available to the public.²⁸⁷ However, Section 613(a) does authorize the Commission to waive the cross-ownership prohibition in order to ensure that all

²⁸¹ See, e.g., *Part 74 Second R&O*, 101 F.C.C.2d at 91 ¶ 105 (existing operators who begin to lease out excess capacity required to submit copies of their leases to the Commission).

²⁸² See 47 U.S.C. § 309(j)(3)

²⁸³ *Id.*

²⁸⁴ See 47 U.S.C. § 257.

²⁸⁵ Section 21.912 of our rules implements Section 613 of the Act. Section 613 of the Act states that: It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to *offer* satellite master antenna television services separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator’s cable system. The Commission (1) shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services . . . which are owned by a cable operator on October 5, 1992; (2) may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming; and (3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l) (47 U.S.C. § 533(a)). Section 613(a) was added to the Act by Section 11(a) of the 1992 Cable Act (Cable Television Consumer Protection and Competition Act 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act)).

²⁸⁶ Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Limitations and Anti-Trafficking Provisions, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-264, 8 FCC Rcd 6,828, 6,845 ¶ 121 (1993) *citing* Senate Report 102-92 (1991) at 46 (*Cable R&O*).

²⁸⁷ *Cable R&O*, 8 FCC Rcd 6,828, 6,841 ¶ 92 *citing* Senate Report 102-92 at 46. The Senate Committee also indicated that such cross-ownership rules were necessary to enhance competition and to further diversity, by preventing cable operators from warehousing spectrum in an attempt to preclude entry by alternative MVPD providers. *Id.*

significant portions of the franchise area are able to obtain video programming.²⁸⁸ In addition, the cross-ownership restriction shall not apply if the cable franchise operates in a geographic area that is subject to “effective competition.”²⁸⁹

120. When the Cable Act was enacted in 1992, MDS operators were limited to offering television programming to paid subscribers and Congress was concerned with MDS providers’ ability to compete with cable. Six years later, the Commission fundamentally changed the nature of the MDS service when it permitted MDS licensees to construct systems capable of providing high-speed, high-capacity broadband service. In light of the legislative history of Section 613 and the change to the MDS service, we seek comment on how this statutory restriction would apply to non-video services, such as broadband service or mobile phone service. In this regard, we note that the Act does not define “multichannel multipoint distribution service” but does define “multichannel video programming distributor” (MVPD) as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase by subscribers or customers, multiple channels of video programming.”²⁹⁰

121. Under our precedent, eligibility restrictions should be imposed only when (1) there is a significant likelihood of substantial competitive harm in specific markets, and, (2) only when eligibility restrictions are an effective way to address such harm.” When assessing the need to restrict the opportunity of any class of service provider to obtain spectrum for the provision of communications services, our overall goal has been to determine whether the restriction is necessary to ensure that consumers will receive communications services in a spectrum-efficient manner and at reasonable prices.” Consequently, we believe we should rely on competitive market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary. In order to determine the competitiveness of a market, there must be an examination of market concentration in addition to other relevant market facts and circumstances. Also important in determining the competitiveness of a given market are the economic incentives for entry into a market,

²⁸⁸ *Id.* at 6841 ¶ 93 citing 47 U.S.C. § 533(c)(2)(B)

²⁸⁹ 47 U.S.C. § 533(a). See 47 U.S.C. § 543(l). Section 623(l) of the Communication’s Act defines “effective competition” as: A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; B) the franchise area is served by a minimum of two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least fifty percent of the households in the franchise area and the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds fifteen percent of the households in the franchise area; C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least fifty percent of the households in that franchise area; or D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

²⁹⁰ 47 U.S.C. § 522(13).

²⁹¹ See 39 *GHz Report and Order*, 12 FCC Rcd at 18637 ¶ 79.

”See 47 U.S.C. § 151

the existence of potential competitors, and the existence of barriers to entry.” According to the Department of Justice Merger Guidelines, a market is competitive if, in response to a price increase or quality decrease by the incumbents, “...entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.”²⁹⁴

122. Based on our preliminary analysis, we do not believe it likely in most cases that cable operators and/or DBS providers would have the incentive to acquire MDS/ITFS licenses in order to foreclose entry by a wireless MVPD provider. New MDS licensees are very unlikely to be entrants into the MVPD market for reasons discussed earlier in the *NPRM & MO&O*. This conclusion is based upon the fact that the current MDS video providers have been unable to penetrate the vast majority of markets within the United States. Overall, the service has proven to be unsuccessful and at the moment is not a viable alternative to cable and DBS. We request comment on whether opening up eligibility to cable providers would have a significant effect on concentration in video markets.

123. Although we anticipate that this spectrum will be largely used as a mobile voice and data service, the most relevant issue may be whether or not open eligibility for cable operators would have a negative impact on the broadband internet market. Industry analysts estimated that in the Fall of 2001 approximately 68% of residential broadband subscribers used cable modem service, 29% used Digital Subscriber Line (DSL) service, and about 3% used various radio-based technologies.²⁹⁵ Industry analysts also estimated that in the second quarter of 2002, approximately 66% of the total cable and DSL subscribers were cable subscribers and about 34% were DSL subscribers.²⁹⁶ Our own data indicate that 57% of high speed lines (connection to an end-user that is faster than 200 kbps in at least one direction) in service are cable lines, 31% are Asymmetric Digital Subscriber Line (ADSL) lines, and 11% are operated by other fringe competitors (other wireline, fiber, satellite, or fixed).” In addition, 36% of high-speed lines are provided by a Regional Bell Operating Company (RBOC) or other Incumbent Local Exchange Carrier (ILEC), 56% of high-speed lines are provided by cable (non-ILEC), and 7% are provided by other non-ILEC.²⁹⁸ If we assume that a typical market consists of the incumbent service provider, one cable provider, and one other non-ILEC, and assume that the above numbers can be used to represent a typical market, the Herfindahl-Hirschman Index (HHI) is approximately 4500.²⁹⁹ If we don’t allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband

²⁹³ Rule Making to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Services and for Fixed Satellite Services, *Third Order on Reconsideration*, 13 FCC Red 4856, 4861 ¶ 7, 4863 ¶ 12 (1998).

²⁹⁴ 1992 Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, p. 25.

²⁹⁵ *Declaratory Ruling*, 17 FCC Red at 4804.

²⁹⁶ <http://www.cabledataneews.codemic.com/cnfb.html> (visited Feb. 5, 2002)

²⁹⁷ Figures derived from Table 1 of “High Speed Services for Internet Access: Status as of June 30, 2002,” Industry Analysis and Technology Division, Wireline Competition Bureau, Dec. 2002.

²⁹⁸ High Speed Services for Internet Access: Status as of June 30, 2002, Industry Analysis and Technology Division, Wireline Competition Bureau, Dec. 2002, Table 5.

²⁹⁹ Note that we do not have the data necessary to explicitly delineate the relevant product and geographic markets but believe that this analysis can give us a general idea of likely concentration levels.

market, the HHI ranges between approximately 5000 and 5400. The above figures indicate that the typical broadband internet market is very highly concentrated. We request comment on this analysis and any evidence to the contrary. Commenters also should identify and discuss any regional differences and/or differences between urban and rural areas that impact such analysis.

124. We note that broadband market shares for residential and small business markets are quite different from those of medium and large size business markets. As of June 30, 2002, national high-speed residential and small business lines consisted of 65% cable lines, 31% ADSL lines, and 3% other.³⁰⁰ Business (medium and large size) lines consisted of 1% cable lines, 32% ADSL lines, 43% other wireline, 23% fiber, and 1% satellite or fixed wireless.³⁰¹ In addition, 31% of residential and small business high-speed lines are provided by a RBOC or other ILEC, 65% are provided by cable (non-ILEC), and 4% are provided by other non-ILEC on a national basis. Seventy-two percent of business (medium and large size) high-speed lines are provided by a RBOC or other ILEC, and 28% are provided by non-ILECs. We note that cable seems to play a very insignificant role in the business market. If we assume that a typical residential (and small business) market consists of the ILEC provider, one cable provider, and one other non-ILEC, and assume that the national figures can be used to represent a typical local market, the HHI is approximately 5200. If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband market, the HHI ranges between approximately 5500 and 5800. We note that the residential numbers indicate that the markets are more concentrated than the total numbers indicate. If we assume that a typical business (medium and large size) market consists of the incumbent service provider and one other non-ILEC, the HHI is approximately 6000. Markets in which the non-ILEC plays a very insignificant role are essentially monopolies and the HHI can approach 10,000. As the national market share for the non-ILEC (excluding cable) for the business market is quite a bit higher than for the residential market, we request comment as to whether there is likely to be more than one non-cable, non-ILEC provider in a typical broadband business market.

125. Although the typical broadband internet market is highly concentrated, in some circumstances there could be substantial benefits to allowing the incumbent cable or DSL operator to have more access to the MDS/ITFS spectrum. For example, in situations where expensive plant upgrades are not feasible, DSL service providers may be able to use spectrum to offer broadband internet service to customers who live in rural areas or beyond distance limitations from the central office. In addition, rural cable operators may be able to offer broadband internet service by using the spectrum to expand channel capacity (note that there are areas of the country that do not have access to DSL or cable modem service).³⁰² We note that Section 613(a) allows the Commission to waive the cable/MMDS cross-

³⁰⁰ The market shares do not sum to one due to rounding. The data consists of information gathered from qualifying service providers who must submit FCC Form 477 on a biannual basis.

³⁰¹ The mutually exclusive types of technology are, respectively: Asymmetric digital subscriber line (ADSL) technologies, which provide speeds in one direction greater than speeds in the other direction; wireline technologies "other" than ADSL, including traditional telephone company high-speed services and symmetric DSL services that provide equivalent functionality; coaxial cable, including the typical hybrid fiber-coax (HFC) architecture of upgraded cable TV systems; optical fiber to the subscriber's premises (e.g., Fiber-to-the-Home, or FTTH); and satellite and (terrestrial) fixed wireless systems, which use radio spectrum to communicate with a radio transmitter at the subscriber's premises.

³⁰² For example, there are residences and businesses in Jacksonville, FL that have neither access to DSL nor cable modem service. Wireless Communications Association Bulletin. "Clearwire Launches Next-Gen ITFS Service In Jacksonville," Jan. 9, 2003, p. 3.

ownership restriction to ensure that all significant portions of a franchise area are able to obtain video programming. If eligibility restrictions were to be implemented, competition in the broadband internet markets could be enhanced through the use of such a waiver.

126. Given the above analysis we request comment on whether allowing incumbent cable operators and/or DSL providers to be eligible to obtain MDS/ITFS licenses could have a negative impact in some broadband internet markets. If the incumbent cable and DSL operators believe that purchasing unlicensed spectrum at auction would have the effect of precluding current as well as future entry, they may purchase spectrum in an attempt to protect their market power. We request comment on this analysis and specific evidence, including the relevant market shares, for any local broadband internet market that may be negatively affected by allowing open eligibility to incumbent cable operators and/or DSL providers. We also request comment on the impact of an eligibility restriction on rural and underserved areas and whether eligibility waivers would be effective in allowing growth in these areas. When providing market share information, we request that commenters define the relevant geographic and product markets from which the market share information is derived. In addition, we request comment on the likelihood of future entry of wireless broadband internet service providers, assuming that they are not able to purchase the unlicensed ITFS spectrum. That is, are there substantial barriers to entry posed by the limited availability of spectrum?

127. As discussed earlier in the NFRM & MO&O, the proposed band restructuring will make mobile service a viable option in the MDS/ITFS band. Therefore, the effect of open eligibility on the mobile voice and data markets also needs to be considered. The Commission decided last year to “sunset” the CMRS spectrum aggregation limit, or “spectrum cap,”³⁰³ effective January 1, 2003.³⁰⁴ The Commission found that the cap, by setting an *a priori* limit on spectrum aggregation without looking at the particular circumstances of specific proposed transactions, was unnecessarily inflexible and could be preventing beneficial arrangements that promote efficiency without undermining competition. However, the Commission also stated that the Commission would continue to pursue the objectives of “discourag[ing] anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency,”³⁰⁵ but would do so by performing case-by-case reviews of proposed CMRS spectrum transactions rather than by applying a prophylactic rule.” And, as is most relevant here, the Commission found that “to the extent that the initial distribution of spectrum through auction is an issue in the future, that is also amenable to case-by-case review, in the sense that [the Commission] can shape the initial distribution through the service rules adopted with respect to specific auctions.”³⁰⁷

³⁰³ See 47 C.F.R. § 20.6.

³⁰⁴ See 2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, **Report and Order**, 16 FCC Rcd 22,668 (2001) (**Spectrum Cap Order**), *recon. pending*.

³⁰⁵ **Spectrum Cap Order**, 16 FCC Rcd at 22,679 ¶ 26 n.71 (*citing* Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services, GN Docket No. 93-252, **Third Report and Order**, 9 FCC Rcd 7,988, 8,105 ¶ 251 (1993)).

³⁰⁶ “[I]n light of the growth of both competition and consumer demand in CMRS markets, we conclude that case-by-case review, accompanied by enforcement of sanctions in cases of misconduct, is now preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case.” **Spectrum Cap Order**, 16 FCC Rcd at 22,693-94 ¶ 50.

³⁰⁷ *Id.* at 22,696 ¶ 54.

128. Given the current state of competition in the CMRS industry, we believe that such restrictions are not necessary for the 2500-2690 MHz band. To the contrary, does opening this band to as wide a range of applicants as possible encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure efficient use of this spectrum? Is this approach consistent with our statutory mandates? We seek comment on these questions.

129. In sum, we **seek** comment on whether eligibility restrictions over and above those required by statute are necessary in the 2500-2690 MHz band. We seek comment on whether opening these bands to as wide a range of applicants as possible would encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure efficient use of this spectrum. To the extent any potential and substantial harms to competition are raised, we seek comment on whether the most effective means for addressing such allegations would be through a case-by-case review, taking into account all of the fact and circumstances.

E. Technical Issues

130. In the preceding section, we addressed band plan reconfigurations, geographic area licensing and eligibility issues. In this section, we address technical proposals to enhance the service. We ask for comments on these issues as well as suggestions concerning other technical rule changes that may be of benefit to the Services.

1. Signal Strength Limits at Geographic Service Area Boundaries

131. We seek comment on the signal strength limits to apply at geographic area boundaries. Last year, for example, we reallocated forty-eight megahertz in the lower 700 MHz band (broadcast television channels 52-59) to fixed and mobile services while allowing continued provision of broadcast services in the band on a secondary basis, and limited the permissible signal strength at service area boundaries to 40 dBμV/m, the same signal strength limit that we had adopted earlier for the upper 700 MHz band and the 800-MHz EA-based and 900-MHz MTA-based SMR services.³⁰⁸ By comparison, our rules apply a somewhat higher 47 dBμV/m limit at the geographic service area boundaries for broadband PCS,³⁰⁹ for Part 27 services in the 2305-2320 and 2345-2360 MHz bands, and for Part 27 services in the 1390-1395 and 1432-1435 MHz bands.³¹⁰ In all of those cases, the allowed signal strengths are compatible with the provision of low-powered cellular services in adjacent service areas. We are tentatively inclined to follow the same general standard in this proceeding but seek comments on any unique characteristics of the 2500-2690 MHz band that might warrant a different approach.

2. Authorization of Mobile Operation

132. Although we have applied a mobile allocation to the 2500-2690 MHz band, until now we have required MDS and ITFS licensees to obtain separate authorizations before commencing mobile service. We propose to authorize MDS and ITFS licensees to engage in mobile operation by blanket-licensing such operation under those licensees' geographic service area authorizations. We seek comment on the advisability of such blanket licenses and any requirements they should contain, including but not limited to those discussed above and below.

³⁰⁸ See *Lower 700 MHz Band R&O*, 17 FCC Rcd at 1,070 ¶ 119. This limit is codified at 47 C.F.R. § 27.55(a)(2)

³⁰⁹ 47 C.F.R. § 24.236

³¹⁰ 47 C.F.R. § 27.55(a)(1) and (3)

3. Power and Antenna Height Limits

133. *Response Stations.* Under our current rules, we limit response stations to a transmitter output power of 2 watts.” This is the same requirement that we have for broadband PCS mobile/portable operation in the 1.9 GHz band.³¹² However, the Coalition notes that we adopted the 2-watt limit in the *Two-Way Order* without any explanation and urges that we delete this power limit.³¹³ It says that the limit unduly restricts the flexibility of equipment designers to make the most efficient use of the 2.1 and 2.5 GHz bands. The Coalition emphasizes, however, that it is not advocating any change in the restrictions on power contained in Parts 1 and 2 that are designed to assure the protection of human health and safety; in fact, it recommends that we clarify that those limits apply to MDS and ITFS by adding those services to the list of services specifically shown as being subject to the rules.³¹⁴

134. While the 2-watt limit on PCS response stations seemed like a reasonable model to follow when we adopted a similar rule for MDS and ITFS, the record of the PCS proceeding indicates that the 2-watt limit was originally designed to reduce the likelihood of interference with fixed microwave stations in the PCS bands.³¹⁵ We seek comment on the extent to which similar concerns should apply for MDS and ITFS, bearing in mind the differences between the incumbent licensees in the MDS/ITFS bands – and their circumstances – as compared with the incumbent licensees in the PCS band. While compliance with our safety rules may by itself necessitate compliance with a 2-watt limit for devices that are normally held close to the user’s body, those rules allow higher power levels in circumstances where the response station’s transmission antenna is designed to be used at least twenty centimeters away from the body of the user or any nearby persons.³¹⁶

135. Finally, we seek comment on whether we should establish a maximum antenna height for response stations in view of our proposal to blanket-license such stations. While mobile or portable stations would typically be close enough to the ground that they would be shielded by nearby structures, the rules that we contemplate adopting for these services would also permit the deployment of response stations at fixed locations, where they could be attached to antennas at high elevations. Such transmitters would have a greater potential for generating unwanted electrical interference. We seek comment on whether or not the signal strength limits that we propose to apply at geographic service area boundaries would obviate the need for antenna height limits.

³¹¹ See 47 C.F.R. §§ 21.909(g)(2) and 74.939(g)(2).

³¹² See 47 C.F.R. § 24.232.

³¹³ Coalition Proposal at 25.

³¹⁴ *Id.* at 26.

³¹⁵ Amendment of the Commission’s Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7,700, 7,764-7,765 ¶ 156(1993).

³¹⁶ At frequencies above 1.5 GHz, mobile devices whose effective radiated power (ERP) is less than 3 watts are not required to undergo even routine environmental evaluation for radio frequency exposure prior to equipment authorization or use. 47 C.F.R. § 2.1091. A mobile device is defined for this purpose as “a transmitting device designed to be used in other than fixed locations and to generally be used in such a way that a separation distance of at least 20 centimeters is normally maintained between the transmitter’s radiating structure(s) and the body of the user or nearby person.” *Id.* Units designed to be used within twenty centimeters of a person are defined as “portable devices” and are subject to more stringent requirements. 47 C.F.R. § 2.1093.

136. Base/Main Stations. We note that there is no specific power limit specified for low power base stations nor are there base station transmitting antenna height limits for operating in this band. In view of our proposals above to limit power at other licensees' border areas, we ask for comment on whether there would be any benefit to establishing base station power and antenna height limits.

137. In particular, we seek comment upon a Coalition proposal to create incentives, but not an absolute requirement, for licensees to limit the height of low power base stations near their **GSA borders**.³¹⁷ The Coalition expresses concern that a **47 dBμV/m** signal strength limit at GSA boundaries might not provide sufficient protection against interference to base station receivers. The scenario that causes them the most concern would arise when the interfering licensee is using a channel for downstream communications from its base stations, and the interfered-with licensee in a contiguous GSA is using the same channel for upstream communications to its base stations. Under these circumstances, the Coalition would have us apply a safe-harbor requirement that both licensees limit their antenna heights to **D²/17**, where **D** is the distance in kilometers between the base station causing the interference and the point where a line connecting the transmitting base station with the neighboring receiving base station intersects the boundary between their respective GSAs. Antenna height for this purpose would be defined as the height in meters of the antenna's centerline above the average elevation along the line between the two base stations.³¹⁸ If a transmitting licensee's antenna is not within the safe-harbor height limit and the receiving licensee's antenna is within the safe harbor, the transmitting operator would be required to take such measures as are necessary to limit the level of the undesired signal at the receiving base station to **-107 dBm or less**.³¹⁹

138. By comparison with the Coalition's recommendations, our Broadband PCS rules do not impose any direct limit on antenna heights, but they apply a graduated reduction in permissible e.i.r.p. output for base station antennas that are more than **300 meters in height**.³²⁰ On first impression, the Coalition's proposal appears to lack certainty, insofar as the requirements imposed upon a licensee would be dependent upon actions taken by a neighboring licensee. However, a licensee could ensure its compliance with the recommended safe harbor, regardless of any future actions taken by the neighboring licensee, by drawing a line intersecting the nearest point on the GSA boundary and assuming that the other licensee might someday site a base station somewhere on that line. The recommended formula could then be applied to determine the maximum safe-harbor height for any given distance from the boundary. The safe harbor distance formula proposed by the Coalition does not adversely affect the typical 2-5 mile antenna service distance and 150 to **300'** height above average terrain (HAAT) of base stations in low-power cellular networks. Although it seems to have a minimal effect on typical base station design, it is unclear how the coalition arrived at the formula itself. Is the formula really necessary? Is the formula "technology agnostic"?

139. In addition, given our licensing approach discussed herein, we seek comment on whether there is a need to reduce the maximum power permitted for high-powered video operations.³²¹ Finally, we request comment on the Coalition's proposal to eliminate the limitation pertaining to the use of digital

³¹⁷ See Second Supplement to the Coalition Proposal at 3-7, filed Feb. 7, 2003

³¹⁸ *Id.* at 5.

³¹⁹ *Id.* at 6.

³²⁰ 47 C.F.R. § 24.232(a)

³²¹ See 41 C.F.R. § 74.935

modulations with non-uniform spectral densities, i.e., the uneven or random distribution of energy throughout the specified spectrum.³²²

4. Emission Limits

140. The purpose of emission limits, also known as emission masks, is to provide protection against adjacent channel interference (e.g., restrict transmitter emissions on a range of frequencies removed from the licensee's assigned frequency or frequency band). The current rules governing emission limits for MDS and ITFS are set forth in Section 21.905 and 74.936, respectively. The current rules are based, however, on high power video operation and vary slightly between the services. As discussed herein, MDS licenses have indicated an interest to use this band for low power two-way operations. Further, we are proposing rules for mobile operation in this band. Consequently, we believe that modification of the rules governing out-of-band emissions may be necessary.

141. The Coalition recommends that we require equipment on the LBS and UBS channels (both base stations and stations at a customer's premise) to attenuate the power below the transmitter power (P) by at least $43 + 10 \log_{10}(P)$ dB on any frequency outside a licensee's authorized spectrum.³²³ This recommendation is the same as the general emission mask the Commission adopted for operations in both the upper and lower 700 MHz band.³²⁴ For the R channels the Coalition suggests requiring an attenuation of at least $80 + 10 \log_{10}(P)$ dB. The Coalition also asserts that additional attenuation may be required in special circumstances. For example, the Coalition states that the rules be changed to require a licensee to take steps to attenuate out-of-band emissions by at least $67 + 10 \log_{10}(P)$ dB upon written request from an adjacent channel licensee.³²⁵ Requiring a licensee to reduce its out-of-band emissions at the request of an adjacent channel licensee, however, is not something we have done in the past. The Coalition also outlines a more restrictive mask for protecting operations on the MBS channels³²⁶ and for licensees of MBS channels to protect operations on LBS and UBS channels.³²⁷ Our initial observation here is that adopting all the Coalition's recommendations would be inconsistent with our attempt herein

³²² See Coalition Proposal at 25 n.70.

³²³ Coalition Proposal at 29.

³²⁴ Lower 700MHz Band R&O, 17 FCC Rcd at 1,070¶ 122

³²⁵ According to the Coalition's Proposal, the written request must include a certification from the requesting licensee that it intends to initiate service on the affected adjacent channel group at a date certain (not more than one year after the date of the written request), and that the additional attenuation is required due to the respective technical characteristics of the requesting licensee's planned facilities and those of the party receiving the request. The requesting licensee must also include in the written request currently available information regarding its planned network design comparable in scope to the information required to be filed upon completion of the construction of its facilities. See Coalition Proposal at 29.

³²⁶ The Coalition states "[i]n addition to the other requirements imposed on out-of-band emissions by stations operating outside the MBS, the licensee of any transmitter operating in the LBS, UBS, I, J, or K channels shall manage its out-of-band emissions such that the noise power introduced into an MBS channel does not exceed an EIRP of -37 dBm without the consent of the affected MBS channel licensee. Notwithstanding the foregoing, if the licensee of a channel outside the MBS digitizes a channel within the MBS, the noise power introduced into that channel of the MBS shall not exceed an EIRP of -20 dBm without the consent of the affected MBS channel licensee." See Coalition Proposal at 30.

³²⁷ See Coalition Proposal at 16, nn.39, 41.

to simplify the rules governing this band (*e.g.*, minimize harmful interference without establishing overly burdensome requirements). Nevertheless, we seek comment on whether we should adopt the Coalition's recommendations concerning out-of-band emissions or different criteria and details on measurement procedures to determine **compliance**.³²⁸ Further, we seek comment on the appropriate emission mask for mobile operations. In that regard, we note that we recently adopted out of band emission requirements to ancillary terrestrial component (ATC) mobile units in the 2000-2020 MHz band in order to protect adjacent channel PCS operations.³²⁹ Since Mobile Satellite Service (MSS) and ATC units will be operating in the band immediately below 2500 MHz, we seek comment on whether similar limits should apply. We also seek comment on whether any special rules are needed to protect the Earth Exploration Satellite (passive), Radio Astronomy, and Space Research allocations in the 2690-2700 MHz band.³³⁰ Finally, we request comment on whether we should specify a frequency tolerance or require equipment to maintain its operations fully within the emission mask at all times.

5. Technology

142. The Coalition states that we should not restrict operation in this band to a particular technology or technologies and our rules should remain technology-neutral to the maximum extent possible.” However, it does mention second-generation equipment employing two different technologies – FDD and TDD. The Coalition notes that FDD technology requires a separation between the highest frequency used in one direction and the lowest frequency used in the other direction.” To allow for FDD technology, the Coalition proposes that when this technology is employed by a licensee, the LBS be restricted to subscriber-to-base (upstream) communications and the UBS be restricted to base-to-subscriber (downstream communications).³³³ According to the Coalition, this framework will simplify adjacent channel coordination and provide the vendor community with a degree of certainty as to the band usage that will translate into lower equipment costs and smaller equipment. We seek comment on whether we should specify upstream and downstream channels in the rules should licensees use FDD or a similar technology. We also ask for comment on whether we should establish formal channel pairings to standardize the separation between channels used in upstream and downstream equipment.³³⁴ In addition, we ask for comment on what role software defined radio technology can play

³²⁸ For example, the Coalition suggests that we measure out-of-band emissions at the outermost edges of the combined channels where two or more contiguous channels are employed in the same system. *See* Coalition Proposal at 29 n.79. *See also* Coalition Proposal at 30 n.81.

³²⁹ Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, IB Docket No. 01-185, *Repon and Order and Notice of Proposed Rulemaking*, FCC 03-15 (rel. Feb. 10, 2003) at ¶ 119.

³³⁰ *See* 47 C.F.R. § 2.106 n.US246.

³³¹ Coalition Proposal at 11 and 15.

³³² The Coalition points out that the Commission's *Interim Repon* stated that a separation of at least 30 megahertz between upstream (customer to base) and downstream (base to customer) transmissions is needed to provide sufficient isolation of signals in the duplexer. *See* Coalition Proposal at 16. *See also* *Interim Report* at 54.

³³³ Coalition Proposal at 16.

³³⁴ In raising these questions, we recognize that the Coalition Proposal does not provide for formal pairings of channels but that, as the Coalition notes, operators could choose to pair channel groups that are sufficiently separated to allow upstream and downstream FDD communications. *See* Coalition Proposal at 15, n.40.

here in resolving potential problems. Finally, we ask for comment on whether the Commission should adopt standards for mobile operation to promote interoperability and roaming.

6. Unlicensed “Underlay” Operation

143. As noted previously, one of the underlying goals of this proceeding is to promote increased access to spectrum. In this regard, we note that Intel and Microsoft advocate that we create or at least preserve the opportunity to create unlicensed “underlay” rights for very low-powered devices on these channels.³³⁵ Recently, we issued a Notice of Inquiry concerning making additional spectrum available for use by unlicensed devices in the television bands and in the 3650-3700 MHz band.³³⁶ In the *Unlicensed NOI*, we noted that there have been significant advances in technology that that may make it feasible to design new types of unlicensed equipment that would not cause interference to existing services.³³⁷ For example, equipment could be designed that could monitor spectrum before transmitting to avoid interference, or equipment could be designed that could use the Global Positioning System to know where it is located and determine whether there are licensed operators in the area.³³⁸ We also noted that allowing unlicensed operation with minimal technical requirements could potentially permit the development of new and innovative types of devices, such as new wireless data networks.³³⁹

144. The proximity of the 2500-2690 MHz band to successful unlicensed technologies in the 2.4 GHz band, and our goal of increasing the intensiveness and efficiency of use of the 2500-2655 MHz band, suggests that it may be appropriate to consider enhancing unlicensed use in the that band on a secondary, non-interference basis.³⁴⁰ While we recognize that unlicensed operations under our Part 15 rules are subject to the condition that the transmitter does not cause interference to authorized services, we nonetheless are mindful in this context that additional measures may be necessary to ensure that unlicensed operations do not cause interference to existing, licensed operations. In that regard, we note that WCA believes that Microsoft’s and Intel’s proposal is premature. WCA contends that the necessary technology for mass producing affordable devices capable of measuring and reliably adapting to the presence of background noise or “interference temperature” has not been demonstrated.³⁴¹

145. As we observed in the *Unlicensed NOI*, allowing unlicensed devices to operate on spectrum that is not being utilized in a particular area would be a more efficient use of spectrum.³⁴² We seek comment on possible revisions to our rules to enhance unlicensed operations in the 2500-2690 MHz band. Are equipment economies possible between the 2.4 GHz band and the 2.5 GHz band for

³³⁵ Intel Reply Comments in RM-10586, at 5; Microsoft Reply Comments in RM-10586, at 3-4

³³⁶ Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, ET Docket No. 02-380, *Notice of Inquiry*, 17 FCC Rcd 25,632, (2002) (“*Unlicensed NOI*”)

³³⁷ *Id.* ¶ 13

³³⁸ *Id.*

³³⁹ *Id.* ¶ 21

³⁴⁰ We also seek comment on a proposal to allow unlicensed operation on a primary basis for unassigned ITFS spectrum. See paras. 79-82, *supra*.

³⁴¹ WCA Comments in ET Docket No. 02-135, at 10.

³⁴² *Unlicensed NOI*, ¶ 14.

unlicensed operators? What Part 15 rules would need to be changed in order to allow enhanced unlicensed operation? Could we permit power levels greater than 1 watt for such operations without causing harmful interference to authorized MDS and ITFS users? If so, we seek comment on the maximum permissible power level. Would any restrictions on antenna gain or directivity be necessary? What other requirements would be necessary to protect existing MDS and ITFS users? Is unlicensed use appropriate for any of the band plans we mentioned earlier?³⁴³ If we create high-power and low-power sections of the band, should we permit unlicensed use in one section of the band but not the other?

146. We seek comment on the extent to which underlay rights would have practical utility if they were made available on a less-than-nationwide basis. Is it feasible to manufacture affordable transceivers that are capable of using underlay rights where and only where such access is offered, if some but not all licensees on a given channel allow underlay access? If not, what kinds of institutional frameworks could facilitate national aggregation and sale of underlay rights? If a licensee or a group of licensees were willing to sell such rights, what kinds of entities would be likely purchasers? To make such transactions feasible, would it be necessary for the Commission to issue separate licenses for underlay rights, or would it suffice for the primary licensees to commit themselves contractually to refrain from seeking enforcement of interference protection from underlay users? If companies like Intel or Microsoft were willing to consider paying licensees to allow underlay operation on their channels, would the vendors seek to restrict underlay operation to their own customers, or would it suffice, from their perspective, if licensees were to allow underlay operation by anyone on their channels?

147. In addition, we note that Part 15 transmitters may not operate in certain restricted bands, including 2655-2690 MHz.³⁴⁴ Are there any circumstances under which unlicensed operation could be allowed in the 2655-2690 MHz band without adversely affecting passive sensing operations in the 2655-2700 MHz band?

148. We also seek comment on what rules might provide incentives for licensees to offer access to devices operating above Part 15 power limits either through secondary markets or an “easement” basis. Although our first choice is that licensees make available these rights via commercial transactions, we recognize that in many cases transaction costs may be too high to enable efficient transactions, and that in some cases licensees may refrain from entering into such transactions to preclude potential competitors. We seek comment on whether high transaction costs or anti-competitive motivations will hinder such transactions.

7. RF Safety

149. The Coalition states that to implement its proposed approach, we should amend our RF emissions rules. More specifically, the Coalition contends that we should amend Sections 1.1307(b)(2), 2.1091(c) and 2.1093(c)³⁴⁵ to include MDS and ITFS services.³⁴⁶ The Commission considers RF safety

³⁴³ See paras. 79-82, *supra*.

³⁴⁴ 47 C.F.R. § 15.205.

³⁴⁵ See 47 C.F.R. §§ 1.1307(b)(2), 2.1091(c) and 2.1093(c).

³⁴⁶ See Coalition Proposal at 20, n.5 1 and 26.

procedures to be essential in protecting human beings from excessive exposure to RF energy.” Accordingly, we seek comment on whether and how we should amend the RF safety rules.

8. North American Datum (NAD) 83 Coordinate Data

150. The Coalition notes that our rules require the submission of different coordinate data for licensing actions. Applicants submit coordinate data in NAD83 for applications filed on FCC Form 331 but in NAD27 for all other MDS/ITFS forms. The Coalition asks that we require applicants to use NAD83 coordinate data and update or convert the current database.³⁴⁹ As stated above, we propose to process applications using the ULS. We require NAD83 coordinate data for applications filed under ULS. Accordingly, we propose to require all licensees to file coordinate data using NAD83 and propose to convert existing data to NAD83. We seek comment on these proposals.³⁴⁹

9. MDS Response Station Hubs

151. Our existing rules treat hubs like main stations for application processing purposes. For instance, whereas 47 C.F.R. Section 1.1104 contains a special section on the application fee for signal booster applications and for signal booster certification of completion of construction applications (\$70.00 in each instance), the rules do not differentiate between requirements for main station applications and certifications and response station hub applications and certifications. At present, the fee for a response station hub on a Form 331 is \$210.00, and the fee for the Form 304A is \$610.00.³⁵⁰ Section 21.909 states that an MDS response station hub application must be filed on a Form 331. Licensees of MDS response station hubs must also file a certification of completion of construction application?” Response station hubs, signal booster stations and R channels are considered stand-alone stations, and thus have unique facility ID numbers separate from the associated main stations.³⁵² However, at this time, only signal booster stations are designated for special treatment in the application fee schedule. We do not believe that certifications of completion of construction of two-way hubs will be necessary under the GSA licensing approach that we propose, and therefore propose to eliminate such filing requirements.

10. 2150-2162 MHz band

152. In the *Third Report and Order*, the Commission addressed relocation issues for the MDS channels in the 2150-2162 band. We stated that MDS incumbents would be entitled to comparable facilities and/or adequate replacement spectrum. The Commission noted that “our relocation policies do

³⁴⁷ The existing requirements are located in 47 C.F.R. §§ 1.1307(b), 1.1310, 2.1091 and 2.1093

³⁴⁸ Coalition Proposal at 56

³⁴⁹ With regard to the Coalition’s request to convert the database, we note that the Wireless Bureau has asked MDS and ITFS licensees to review their license data, including coordinate data, to determine if it is correct. See Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS and MMDS License Status and Pending Applications, *Public Notice*, DA 02-2751, released Oct. 18, 2002.

³⁵⁰ See 47 C.F.R. §§ 1.1104 and 21.909(c)(1).

³⁵¹ 47 C.F.R. § 21.909(h)(i)(2).

³⁵² See *Public Notice*, Mass Media Bureau Multipoint Distribution Service and Instructional Television Fixed Service Applications Tendered For Filing, Report No. 148, (Nov. 29, 2000).

not dictate that systems be relocated to the same amount of spectrum as they currently use, only that comparable facilities be **provided**.”³⁵³ We further concluded that “[g]iven advances in technology, e.g., changing from analog to digital modulation and the flexibility provided by **our** existing relocation procedures to make incumbents’ whole, we believe that current MDS operations could be accommodated using substantially less spectrum than that of the existing 2150-2160/62 MHz allocation.” We then sought comment on how much spectrum was necessary for MDS relocation. The Commission further noted “under our relocation policies only stations with primary status are entitled to **relocation**.”³⁵⁴

153. In light of the fact that we do not yet know where MDS licensees operating on Channels 1 and 2 (or 2A) will be relocated, we will not propose changes to service rules for those channels at this time. Depending on the relocated spectrum that MDS licensees receive, additional technical rules may be necessary to accommodate the technical characteristics of that spectrum. Once relocation spectrum for these MDS licensees has been identified, we will issue a further notice of proposed rulemaking in this proceeding seeking comment on service rules for relocated licensees.

11. Radiation from Stations that are Not Engaged in Communications

154. On September 25, 1998, the Commission amended its rules to allow MDS and **ITFS** licensees to provide a wide range of high-speed, two-way services to a variety of users.” On July 29, 1999, the Commission made some additional rule modifications to facilitate the provision of these services.³⁵⁶ On December 22, 1999, IPWireless, Inc. (IPWireless) requested reconsideration of the Commission’s out-of-band emission **limitations**.³⁵⁷ On February 10, 2000, the group of over 100 wireless communications system operators, Commission licensees, equipment manufacturers and consultants who were parties to the Petition for Rulemaking that commenced the *Two-way Proceeding* (collectively, Petitioners) did not oppose IPWireless’ petition, but sought clarification of Sections 21.909(m) and 74.939(o) of our **Rules**.³⁵⁸ The Petitioners indicated that there was some uncertainty within the industry

³⁵³ See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, *Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order*, ET Docket No. 00-258, FCC 03-16, ¶72 (2003) (*AWS Third R&O, Third NPRM, and Second MO&O*).

³⁵⁴ In 1992, when the 2160-2165 MHz band was reallocated to emerging technologies, the Commission implemented a policy by which incumbent MDS licensees that were using the 2160-2162 MHz band would continue such use on a primary basis. See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886, 6889 ¶17 (1992). However, any MDS station that applied for use of this band after January 16, 1992 would be granted only on a secondary basis to emerging technology use. *Id.* at n.22.

³⁵⁵ *Two-Way R&O*, 13 FCC Rcd 19,112.

³⁵⁶ Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-way Transmissions, *Report and Order on Reconsideration*, 14 FCC Rcd 12,764 (1999) (*Two-way R&O on Recon*).

³⁵⁷ IPWireless, Inc. Petition for Reconsideration, filed Dec. 22, 1999,

³⁵⁸ Petitioners Consolidated Comments and Partial Opposition at 5 (Consolidated Comments) filed Feb. 10, 2000. Although the Commission inadvertently indicated that WCA requested clarification, we take this opportunity to correct the record to reflect that the Petitioners requested clarification of this issue. See Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage (continued....)

as to the meaning of the language, "Radiation of an **unmodulated** carrier and other unnecessary transmissions are **forbidden**."³⁵⁹

155. The Petitioners requested clarification that this language requires a response station's transmitter to be biased off so that no RF Gaussian noise is emitted when the station is not engaged in **communications**.³⁶⁰ The Petitioners argued that this interpretation assures the protection of the noise floor of adjacent channel and adjacent market licensees against unnecessary emissions from **transceivers**.³⁶¹ On May 11, 2000, the Petitioners and IPWireless notified the Commission that it had reached a compromise concerning the appropriate level of emissions that a response station may generate when not directly engaged in communications with a response **hub**.³⁶²

156. The Petitioners and IPWireless requested amendment of Sections 21.909(m) and 74.939(o) of our Rules to provide that when a response station is not in communications with its associated hub, it must restrict its field **strength**.³⁶³ First, they proposed to set the permissible level of RF Gaussian noise at 10 microvolts/meter per 1 MHz bandwidth at a distance of 3 meters for response stations utilizing antennas with 6 dB or less gain over isotropic. Second, they proposed to set the permissible level of RF Gaussian noise at 10 microvolts/meter $\times 10^{\exp[(\text{antenna gain} - 6 \text{ dB}) / 20]}$ per 1 MHz bandwidth at a distance of 3 meters for stations utilizing antennas with more than 6 dB gain over isotropic.³⁶⁴

157. We note that the Commission agreed to clarify this issue and sought **comment**³⁶⁵ on specific issues relating to this **matter**.³⁶⁶ In this *NPRM & MO&O*, we are seeking comments on comprehensive changes to the interference rules that would apply in these services. In light of that fact, we seek further comment on whether the rules changes suggested by the Petitioners are still necessary or appropriate. We note that other services do not have a similar requirement. We ask commenters who support imposition of such a requirement to explain the need for such a requirement in light of other changes we are proposing to our technical rules.

158. In a related matter, we also seek comment on requiring that subscriber handsets not transmit unless a base station pilot is present. Such a rule could be necessary in order to avoid interference to existing operations.

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in Fixed Two-way Transmissions, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 14,566, 14,576 (2000) (*Two-way FNPRM*).

³⁵⁹ Petitioners Consolidated Comments at 6.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² Petitioners and IPWireless, Ex *Parte*, filed May 11, 2000.

³⁶³ *Id.* at 1

³⁶⁴ *Id.*

³⁶⁵ *Two-way FNPRM*, 15 FCC Rcd at 14,516

³⁶⁶ *Two-way FNPRM*, 15 FCC Rcd 14,576-7 ¶¶ 39-40.

F. Standardization of Practices and Procedures

1. Consolidation of Procedural Rules in Part 1

159. With the adoption of the *ULS R&O*, the Commission consolidated the majority of its wireless services procedural rules into Part 1.³⁶⁷ By consolidating the procedural rules in Part 1, the Commission improved the consistency of its rules across wireless services and provided a single point of reference for applicants, licensees, and the members of the public seeking information regarding our licensing procedures.”* Additionally, the consolidation reduced confusion among applicants and licensees, accelerated the application process, and improved the speed with which wireless carriers were able to provide service to the public.³⁶⁹ We believe that consolidating the MDS and ITFS procedural rules into one rule part will decrease confusion concerning the application of our MDS and ITFS rules. Because we believe that consolidation will benefit applicants, licensees and members of the public, we propose to consolidate the MDS and ITFS procedural rules into Part 1. We invite comment on this proposal.

2. Consolidation of Service Specific Rules in Part 101

160. Currently, three rules parts - Parts 21, 73 and 74 – contain our MDS and ITFS service specific rules. Part 21 contains our MDS rules while Parts 73 and 74 contain our ITFS rules. Although MDS and ITFS licensees use their licenses to provide similar services, our rules treat these licensees differently. We believe that regulatory parity will lead to efficiency in this band and spur the development of new and improved services for the public. Additionally, we believe that consolidating the MDS and ITFS service specific rules into one rule part will reduce confusion and provide a single reference point for these similar services. Because we believe that consolidation will benefit applicants, licensees and members of the public, we propose to consolidate the MDS and ITFS service specific rules into Part 101. We also seek comment on alternative means of consolidating the rules relating to these services, such as incorporating the rules into Parts 21 or 27 of our Rules.

3. Standardization of Major and Minor Filing Requirements

161. The license modification rules for MDS and ITFS are spread across seven rules. MDS licensees submit FCC Forms 304 or 331 to modify their licenses pursuant to Sections 21.40 and 21.41 of our Rules.³⁷⁰ For a “major modification” to an MDS station, the Commission will not grant the modification unless it finds that the modification is in the public interest and in compliance with Communications Act.” A major modification to an MDS license would also include an amendment that

³⁶⁷ Biennial Regulatory Review – Amendment of **Parts** 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13FCC Rcd 21,027, 21,054 ¶ 56 (*ULS R&O*).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ 47 C.F.R. §§ 21.40, 21.41

³⁷¹ See 47 C.F.R. § 21.40. A major modification for an MDS license includes a substantial modification of the engineering proposal such as (but not limited to) a change in, or addition of, a radio frequency channel; a change in polarization of the transmitted signal; a change in type of transmitter emission or an increase in emission bandwidth of more than ten percent; a change in the geographic coordinates of a station’s transmitting antenna of more than ten seconds of latitude or longitude or both; any change which increases the antenna height by three meters or (continued...)

would require submission of an environmental assessment, would result in a substantial and material alteration of the proposed service, specifies a substantial change in beneficial ownership **or** control, **or** is deemed substantial by the Commission pursuant to section 309 of the Communication Act.³⁷²

162. **Our** existing rules require an ITFS licensee to file a formal application on FCC Form 330 for any of the following kinds of changes or modifications to its transmission system: adding a new channel; changing channels: changing polarization; increasing the EIRP in any direction by more than 1.5 dB; increasing the transmitting height by twenty-five feet or more; **or** relocating a facility's transmitter site by ten miles **or more**.³⁷³ **Our** rules further provide that applications for "major changes" to existing ITFS facilities that are mutually exclusive with other such applications or with applications for new stations are subject to competitive **bidding**.³⁷⁴ ITFS minor modification applications may continue to be filed at any time and are not be subject to competitive **bidding**.³⁷⁵ **Our** rules also permit certain parties, subject to Commission approval, to modify involuntarily the facilities of an existing ITFS licensee in certain situations.³⁷⁶

163. We have adopted one set of modification rules for the services that we license using the ULS.³⁷⁷ This consolidation of modification rules has led to efficient processing of modification applications in ULS. We treat **all** major modifications as new applications in ULS.³⁷⁸ Licensees may make minor modifications as a matter of right without prior Commission approval (other than pro forma assignments and transfers) within thirty days of implementing such **changes**.³⁷⁹ Where other rule parts permit licensees to make permissive changes to technical parameters without notifying the Commission (e.g., adding, modifying, or deleting internal sites), no notification is **required**.³⁸⁰ Although there are similarities between our current MDS and **ITFS** license modification rules, we believe that there are substantial benefits to employing the simplified approach we use in **ULS** to the MDS and ITFS licenses. We believe that using **our** Part 1 **ULS** modification rules will reduce confusion with regards to the appropriate rules to use, increase the speed with which the Commission staff processes applications and will eliminate redundancy in our rules. Accordingly, we propose to use **our** Part 1 modification rules to

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more; any technical change that would increase the effective radiated power in any direction by more than 1.5 dB; or any changes or combination of changes that would cause harmful electrical interference to an authorized facility or result in a mutually exclusive conflict with another pending application. 47 C.F.R. § 21.23.

³⁷² *Id.*

³⁷³ 47 C.F.R. § 74.951.

³⁷⁴ 47 C.F.R. § 73.5000. We note that our rules permit ITFS licensees to exchange channels even with each other or with **MDS** licensees after filing pro forma applications. 47 C.F.R. § 74.902(f).

³⁷⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15,920 ¶ 207 (1998).

³⁷⁶ **See** 47 C.F.R. § 74.986.

³⁷⁷ **See** 47 C.F.R. § 1.929.

³⁷⁸ **See** 47 C.F.R. § 1.947.

³⁷⁹ **See** 47 C.F.R. § 1.929.

³⁸⁰ **See** 47 C.F.R. § 1.947(b).

determine major and minor modifications for MDS and ITFS licenses. We seek comment on this proposal.

4. Amendments to New and Modification Applications

164. The MDS community apparently did not raise any objections to the procedural rules regarding the tiling of amendments in the Services in response to the Coalitions proposals. However, our consolidated approach to amendments for wireless applications³⁸¹ differs in some respects with our approach to amendments for MDS/ITFS applications.³⁸² We must reconcile these differences. For instance, we must address the treatment of major amendments, and amendments regarding ownership and auction services. MDS operators have recommended that we revise our MDS/ITFS rules to use the same definitions for major and minor amendments as for major and minor modifications.³⁸³ We invite comment on whether to adopt the consolidated wireless procedures for amendments to applications. Furthermore, ITFS applicants may amend applications to cure defects noted in deficiency letters to the applicant. MDS BTA applicants may amend a long-form application up to the date the application has appeared on public notice as accepted for filing or by written petition demonstrating good cause if the application is already on public notice.

5. Assignments of Authorization and Transfers of Control

165. MDS licensees use FCC Form 305 to apply for voluntary assignments; involuntary assignments; and pro forma assignments and FCC Form 306 to apply for voluntary transfers of control,

³⁸¹ Our rules treat certain amendments as new applications that receive a new filing date as of the date the applicant submits the amendment. Amendments that we treat as new applications include applications submitted up to fourteen days after the application appeared as accepted on public notice and that reflects any change in the technical specifications of the proposed facility; submitted with a new or modified analysis of potential interference to another facility; or submitted with an interference consent statement from a neighboring licensee. 47 C.F.R. § 21.23. In such cases, the amended application must include an applicant certification that it has met all requirements regarding interference protection to existing and prior proposed facilities, and that it has obtained any necessary consent letters in lieu of interference protection. The applicant must also certify that it has served all potentially affected parties with copies of its amended application and engineering materials, and that the engineering analyses comply with the rules and methodology. *See* 47 C.F.R. §§ 21.23, 73.3522(a). Furthermore, ITFS applicants may amend applications to cure defects noted in deficiency letters to the applicant. *See* 47 C.F.R. § 73.3522(a). MDS BTA applicants may amend a long-form application up to the date the application has appeared on public notice as accepted for filing or by written petition demonstrating good cause if the application is already on public notice. *See* 47 C.F.R. § 21.926. In both Services, applicants may not amend applications if the proposed amendment seeks more than a pro forma change of ownership or control.

³⁸² Generally, under our consolidated approach for processing wireless applications, applicants may file amendments to pending applications as a matter of right if we have not designated the application for hearing or listed it in a competitive bidding public notice as accepted for filing. *See* 47 C.F.R. § 1.927. Where an amendment to an application constitutes a “major change” as defined in Section 1.929, we treat the amendment as a new application for determination of filing date, public notice, and petition to deny purposes. *See* 47 C.F.R. § 1.927(h). Where an amendment to an application specifies a substantial change in beneficial ownership or control (de jure or de facto) of an applicant, the applicant must provide an exhibit with the amended application containing an affirmative, factual showing as set forth in Section 1.948(h)(2). *See* 47 C.F.R. § 1.927(g).

³⁸³ Memorandum to WCA Government Relations Committee from Paul J. Sinderbrand, Esq., Petition for Rulemaking - Amendment of Parts 21 and 74, at 11, August 1, 2001.

involuntary assignments, and pro forma transfers of control.³⁸⁴ These licensees use FCC Form 304A to request a partial **assignment**.³⁸⁵ However, the assignor should apply for deletion of the assigned facilities, indicating concurrence in an assignee's **request**.³⁸⁶ The parties must consummate these transactions within forty-five days from the date of **approval**.³⁸⁷ If the parties fail to consummate a partial assignment, the parties must submit FCC Form 304A to return the assignor's license to its original **condition**.³⁸⁸ Before the Commission will consent to these transactions, the assignor/transferor must complete construction of the facility and file a certificate of completion of **construction**.³⁸⁹

166. The assignor/transferor must file the certificate of construction within one year from the initial license grant date, the consummation date of the transaction; or median date of the applicable commencement dates if the transaction involves a system of two or more stations. The Commission also requires an assignee/transferee to file FCC Form 430 License Qualification Report with the appropriate application form (Form 305 or Form 306) unless the assignee or transferee already has a current and substantially accurate report on file with the Commission. Finally, the parties of both transactions must notify the Commission of the date of consummation, by letter, within ten days of the date of consummation.

167. ITFS licensees use one form, FCC Form 330, to request an assignment of license or a transfer of **control**.³⁹⁰ With both types of transactions, **ITFS** licensees must file their applications at least forty-five days before the contemplated effective date of the transaction.³⁹¹ However, in the case of an involuntary transaction, notification must be made to the Commission, in writing, promptly after the death or legal disability of a **licensee**.³⁹² Additionally, the Commission requires the filing of an application for involuntary transaction within thirty days of such **occurrence**.³⁹³

³⁸⁴ See 47 C.F.R. § 21.11(d) (Assignment of License); 47 C.F.R. § 21.11(e) (Transfer of control of corporation holding a conditional license or license); 47 C.F.R. § 21.13 (General Application Requirements); 47 C.F.R. § 21.15 (Technical Content of Applications); 47 C.F.R. § 21.17 (Certification of Financial Qualifications); 47 C.F.R. § 21.19 (Waiver of Rules); 47 C.F.R. § 21.38 (Assignment or Transfer of Station Authorizations); 47 C.F.R. § 21.39 (Considerations Involving Transfer or Assignment Applications); 47 C.F.R. § 21.912 (Cable Television Eligibility Requirements and MDS/Cable Cross Ownership); 47 U.S.C. § 310 (Limitation on Holding and Transfer of Licenses (Alien Ownership Restriction)).

³⁸⁵ 47 C.F.R. § 21.11(e)

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ See 47 C.F.R. § 21.934. We note that exceptions exist if there is not a substantial change in ownership or control of the authorized facility from the transaction (assignment/transfer); involuntary transaction due to the licensee's bankruptcy, death, or legal disability; and if the transaction involves BTA authorizations. See *id.*

³⁹⁰ See 47 C.F.R. §§ 74.910, 73.3500.

³⁹¹ See 47 C.F.R. § 73.3540.

³⁹² See 47 C.F.R. § 73.3541.

³⁹³ See 47 C.F.R. § 73.3541.

168. When the Commission developed FCC Form 603 to process assignment of license and transfer of control applications in ULS, the Commission recognized there would be significant benefits to eliminating inconsistencies between similar services. Specifically, the Commission found that replacing service specific forms with consolidated forms would provide the public with a consistent set of procedures and filing requirements and would increase the speed and accuracy of the assignment and transfer process.³⁹⁴ Although there are some differences in the information requirements for transfers and assignments, there is a sufficient degree of overlap in the information that both types of applicants supply that both MDS and ITFS applicants can use the FCC Form 603 for transfers and assignments. Furthermore, we designed the FCC Form 603 so that the applicant only has to answer the questions pertinent to the type of transaction involved.³⁹⁵ We propose to revise our MDS and ITFS transaction requirements to conform to and merge with the ULS requirements in Section 1.948 of our rules.

169. Specifically, we propose to eliminate the prior consent requirement for non-substantial, pro forma assignments in MDS, and extend the consummation notice period to 180 days for both services. We believe these changes will lessen the administrative burden on applicants, licensees, and Commission staff. With regard to involuntary assignments, we propose to integrate the MDS rules into our ULS consolidated rules. We invite comment on this integration.

170. Further, we propose to revise our channel exchange procedures³⁹⁶ to conform to our assignment of license procedures. Currently, our rules require both the filing of a major modification application to change a frequency assignment³⁹⁷ and each licensee seeking to exchange channels to file in tandem with the Commission separate pro forma assignment applications.³⁹⁸ Furthermore, our engineers must generate and enter a minor modification application into BLS for each channel the parties seek to exchange. We find that this channel exchange procedure is unduly burdensome upon licensees and the Commission's resources. The MDS/ITFS community has also asked that we make changes in this area.³⁹⁹ We propose instead to require the licensees involved to treat channel exchanges like any other set of license transfers, i.e., to file two or more applications showing the transferor and transferee for each channel or set of channels being transferred.

6. Partitioning and Disaggregation

171. In other services where we have implemented geographic area licensing⁴⁰⁰ we have allowed licensees to partition their service areas and to disaggregate their spectrum.⁴⁰¹ MDS BTA

³⁹⁴ ULS R&O, 13 FCC Rcd at 21079 ¶ 113.

³⁹⁵ *Id.*

³⁹⁶ See 47 C.F.R. §§ 21.901(d); 74.902(f); 74.951(e).

³⁹⁷ See 47 C.F.R. § 74.951(e).

³⁹⁸ See 47 C.F.R. § 74.902; see also 41 C.F.R. § 21.901.

³⁹⁹ Coalition Proposal at Appendix B n.49.

⁴⁰⁰ See, e.g., 47 C.F.R. §§ 27.15, 101.535, 101.1111, 101.1323.

⁴⁰¹ "Partitioning" is the assignment of geographic portions of a license along geopolitical or other boundaries. "Disaggregation" is the assignment of discrete portions of "blocks" of spectrum licensed to a geographic area licensee or qualifying entity.

licensees may partition their spectrum.''' We seek comment on whether allowing such flexibility here to all licensees will promote efficient spectrum use, rule consistency and facilitate market entry by parties who may lack the financial resources for participation in **ITFS** auctions such as small businesses, educational, telemedicine or medical institutions. The Coalition also supports allowing disaggregation and partitioning to the maximum extent possible.''' Should we allow geographic area licensees of current **ITFS** channels to partition and disaggregate. Under this proposal, licensees could file for partial assignment **of** a licensee, and licensees could apply to partition their licensed geographic service areas or disaggregate their licensed spectrum at any time following grant of their geographic area licensee. The area to be partitioned would be defined by the partitioner and partitionee. The partitionee or Uisaggregate would be authorized to hold its license for the remainder of the partitioner's or disaggregator's license term, and would be eligible for renewal expentancy on the **same** basis as other licensees. There would be no restriction on the amount of spectrum disaggregated and we would permit combined partitioning and disaggregation. Licensees that partition and disaggregate would be subject to provisions against unjust enrichment. We also propose to eliminate any separate provisions relating to "channel swapping" and rely **upon** the ability of licensees to partition and disaggregate their **spectrum**.⁴⁰⁴

172. We also seek comment on factors other than geography or frequency that licensees might reasonably use when disaggregating their licenses. For example, the *Spectrum Policy Report* discusses the possibility that licensees might also be willing to sell off parts **of** their license rights on the basis of time slots and power **levels**.⁴⁰⁵ That report suggests that frequency-agile transceivers are already capable **of** sensing if a given channel is in use at a particular moment in time, by switching channels, reducing power, or remaining silent until a channel becomes available. Should we afford licensees in this band the right to **sell** spare capacity on that basis to others, on a preemptible basis?

7. License Renewal

173. Except for special temporary authorizations (STAs), MDS licensees must file **FCC Form 405, in duplicate**, to renew their **licenses**.⁴⁰⁶ They must file the form between thirty and sixty days before the expiration date of the license to **be** renewed.''' A licensee shall automatically forfeit its license in whole or in part without further notice to the licensee upon the expiration of the license period specified therein, **unless** prior thereto an application for renewal has been filed with the Commission.''' An MDS licensee may seek reinstatement **of** its licenses **by** tiling a petition within **30** days **of** the license's expiration explaining the failure to timely file the required notification or application and setting out with specificity the procedures that the petitioner has established to ensure that such filings will be submitted on time in the future..'' Generally, a license period is ten years. The terms **of MDS** station licenses granted on the basis **of** underlying BTA service area authorizations obtained by competitive bidding

⁴⁰² 47 C.F.R. §21.931

⁴⁰³ Coalition Proposal at 13.

⁴⁰⁴ See, e.g., 47 C.F.R. § 21.901, 47 C.F.R. § 74.902

⁴⁰⁵ *Spectrum Policy Report* at 19

⁴⁰⁶ See 47 C.F.R. § 21.11(c).

⁴⁰⁷ *Id.*

⁴⁰⁸ See 47 C.F.R. § 21.44(a)(2).

⁴⁰⁹ See 47 C.F.R. § 21.43(b).

extend until the end of the ten-year **BTA** authorization.⁴¹⁰

174. ITFS licensees must file an FCC Form 330-R to renew a license.” Unless otherwise directed by the FCC, **ITFS** licensees must file their renewal applications no later than the first day of the fourth full month prior to the expiration date of the license to be renewed.” Licensees in auctionable services file FCC Form **601** no later than the expiration date of the authorization for which renewal is sought, and no sooner than ninety days prior to expiration. The Commission will reinstate expired ITFS licensees if the former licensee files a timely petition with adequate justification!”

175. The Commission designed ULS to provide wireless licensees with a pre-expiration notification approximately ninety days before their licenses expire and thereby avoid situations in which licensees allow their licenses to expire inadvertently and subsequently seek **reinstatement**.⁴¹⁴ The Commission provides preexpiration letters of reminder to all wireless radio services licensees by regular mail. Specifically, the Commission sends letters of reminder to all wireless radio service licensees, both site-specific and geographic area licensees, ninety days before the expiration of their licenses. Although a license expires automatically on the date specified on the individual license, ULS does not show a license expiration as final until approximately thirty days after the renewal deadline. We note that while we generally provide renewal notices to licensees, the pre-expiration notice is not a prerequisite to cancellation should a licensee fail to renew its license. After the license expiration, the previous licensee may file a new application for use of those frequencies subject to any service specific rules. Once that thirty-day period has elapsed, or the prior holder of the license files a new application for that spectrum, the license then becomes available for the Commission to reassign by competitive bidding or other means according to the rules of the particular **service**.⁴¹⁵

176. In 1999, the Commission adopted a new policy regarding treatment of late-filed renewal applications in the Wireless Radio **Services**.⁴¹⁶ Renewal applications that are filed up to thirty days after the expiration date of the license are granted *nunc pro tunc* if the application is otherwise sufficient under our **Rules**.” However, the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal

⁴¹⁰ See 47 C.F.R. § 21.929(b)

⁴¹¹ See *Public Notice*, Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, 17 FCC Rcd 18,365 (2002).

⁴¹² See 47 C.F.R. § 73.3539.

⁴¹³ See, e.g., Jonsson Communications Corp., *Memorandum Opinion and Order*, (DA 02-3099, released Nov. 13, 2002). There is no codified rule specifically addressing reinstatement of ITFS licenses.

⁴¹⁴ ULS R&O, 13 FCC Rcd at 21071 ¶ 96.

⁴¹⁵ See Rules and Regulations to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, 63 Fed. Reg. 68904, 68908 (1998).

⁴¹⁶ See Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, **27**, 80, 87, 90, 95, and 101 of the Commission’s Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*. WT Docket No. 98-20. 14 FCC Rcd 11476, 11485 ¶ 22 (1999).

⁴¹⁷ See *id.* at 11485 ¶ 22

filing.⁴¹⁸ Applicants who file renewal applications more than thirty days after the license expiration date may also request renewal of the license *nunc pro tunc*, but such requests are not routinely granted, and are subject to stricter review, and may be accompanied by enforcement action, including more significant fines or forfeitures.⁴¹⁹ In determining whether to grant a late-tiled renewal application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.⁴²⁰

177. We believe that elimination of the reinstatement period will benefit all licensees and entities interested in acquiring abandoned spectrum.” Under our ULS procedures, failure to file for renewal of the license before the end of the license term results in automatic cancellation of the license.⁴²² We believe that we should eliminate reinstatement of expired licenses because licensees will receive notification that their licenses are about to expire and, therefore, should be responsible for submitting timely renewal applications. Additionally, interactive electronic filing will make it easier for all licensees to timely file renewal applications. Moreover, we believe elimination of the reinstatement procedures will facilitate our ability to efficiently, and quickly perform our licensing responsibilities by reducing the amount of late-filed renewal applications and eliminating the processing of reinstatement applications. Accordingly, we propose to eliminate reinstatement procedures and adopt the late-filed renewal policy for wireless radio services for MDS and ITFS. We seek comment on this proposal. Additionally, we seek comment on whether we should impose any special requirements or limitations on the renewal of ITFS licenses. For example, we seek comment on the possibility of imposing special performance requirements on ITFS licensees in order to ensure efficient utilization of the spectrum. We seek comment on these proposals.

8. Special Temporary Authority

178. In MDS, in circumstances requiring immediate or temporary use of facilities, entities may request special temporary authority to install and/or operate new or modified Requests may be submitted as informal applications, at least ten days prior to the date of the proposed construction or operation (however, in practice an FCC Form 304 is attached to the informal request).⁴²⁴ We may grant STAs without regard to the thirty-day public notice requirement in certain instances. First, we may grant an STA when the STA period is not to exceed thirty days and the filing of an application to change the STA into a permanent situation is not contemplated. Second, we may grant an STA when the STA period is not to exceed sixty days, pending the filing of an application to change the special situation into a regular operation. Third, we may grant an STA to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 11485-6 ¶ 22.

⁴²¹ *ULS R&O*, 13 FCC Rcd at 21,071 ¶ 96. The Commission excluded Commercial Radio Operators Licenses and Amateur licenses from this policy. *Id.*

⁴²² *Id.*

⁴²³ See 41 C.F.R. § 21.25.

⁴²⁴ 47 C.F.R. § 21.5.

authorized. Fourth, we may grant an STA when there are extraordinary circumstances requiring operation in the public interest. We may grant STAs and extensions of STAs up to 180 days pursuant to Section 309(f) of the Communications Act where extraordinary circumstances so require, but the licensee has a heavy burden to show it warrants such action. Finally, in times of national emergency or war, we may grant special temporary licenses (in place of construction permits, station licenses, modifications or renewals) for the period of the emergency.⁴²⁵

179. We may grant ITFS STAs in extraordinary circumstances requiring emergency operation to serve the public interest.⁴²⁶ As in MDS, only an informal application is required. However, ITFS STA applicants must submit the request at least ten days before the date of the proposed operation. We may grant **ITFS** STAs for a period not to exceed 180 days with a limited number of extensions also granted for up to 180 days. However, we may grant an STA necessitated for technical reasons for an initial period of ninety days only.

180. Under our consolidated ULS approach, applicants must file STA requests electronically on an FCC Form 601 within ten days before the date of the proposed operation (although we may grant requests received less than ten days for compelling reasons).⁴²⁷ As in MDS/ITFS, grant of STAs are without public notice. Wireless Services have the same requirements as MDS/ITFS for thirty, sixty, and 180-day STA requests. In addition, since MDS STA requests are informal applications, but in practice have an FCC Form 304 attached, adoption of the Form 601 for MDS/ITFS STA requests as currently used in WTB makes good sense. Since STAs are an emergency measure, mandatory electronic filing as now required in WTB, would also provide MDS/ITFS licensees with faster, more responsive service. For the foregoing reasons, we propose to include MDS and ITFS STA requests under the same ULS regulatory regime as the Wireless Services. We request comment on this proposal.

9. Ownership Information

181. MDS and ITFS licensees file FCC Form 430 to submit ownership information to the Commission. The Communications Act mandates the ownership information requested in Form 430.⁴²⁸ The submission of ownership information enables the Commission to review whether applicants and licensees comply with our real-party-in-interest rules, eligibility for treatment as a small business at auction and foreign ownership restrictions.⁴²⁹ Wireless licensees use Form 602 to file ownership information electronically in ULS.⁴³⁰ FCC Form 602 and FCC Form 430 request the same ownership

⁴²⁵ Id.

⁴²⁶ See 47 C.F.R. § 73.3542; see also 47 C.F.R. §§ 73.1635; 74.910.

⁴²⁷ See 47 C.F.R. § 1.931

⁴²⁸ See 47 U.S.C. § 310

⁴²⁹ See *ULS NPRM*, 13 FCC Rcd 9672,9691 ¶ 43 (1998). ■

⁴³⁰ ULS will pre-fill information that the licensee has previously submitted on a Form 602, enabling the licensee to limit new submissions to changed information, and ULS can also fill in certain parts of a Form 602 by reference to other previously filed information. For example, if Party A has previously submitted its own ownership filing and is subsequently listed as a disclosable interest holder on the ownership filing of another licensee (Party B), Party A's FCC-regulated businesses may be automatically copied to Party B's filing. **Public Notice**, Wireless Telecommunications Bureau Announces Availability of Electronic Filing of FCC Form 602, 17 FCC Rcd 16,779 (2002).

information.⁴³¹ On June 14, 2002, the Wireless Bureau stopped accepting electronically tiled Forms 430 temporarily.⁴³² Therefore, in the short term, MDS and ITFS licensees may continue to file the Form 430 manually. The Form 430 requires the licensee to list its MDS and/or ITFS licenses or conditional licenses. We seek comment on whether this requirement is necessary in light of the proposed transition to ULS.⁴³³ Additionally, we propose to require MDS and ITFS licensees to file Form 602 instead of Form 430 to submit ownership information. We request comment on this proposal.

10. Regulatory Status

182. Consistent with our goal to maximize flexibility to the extent possible, we tentatively conclude that MDS and ITFS applicants may request more than one regulatory status for authorization in a single license. Thus, under this approach, an MDS or ITFS license may authorize a combination of common carrier and non-common carrier services in a single license and licensees in this band may render any kind of communications service (*e.g.*, fixed, mobile, point-to-multi-point) consistent with that regulatory status and the existing rules. This approach is consistent with the approach we have used for other services licensed on a geographic area basis.⁴³⁴ Applicants would not be required to describe the services they seek to provide but would be required to designate the regulatory status of services they intend to provide using the Form 601.⁴³⁵ We seek comment on what procedures to adopt for licensees to change their regulatory status (*i.e.*, notify the Commission within a certain timeframe or seek prior approval).

11. Fee Issues

183. Currently, MDS applicants and licensees are subject to application fees under Section 8 of the Act, which directs the Commission to assess and collect charges for applications and other filings by regulated entities.⁴³⁶ These fees were initially set by statute and are subject to adjustment by the Commission.⁴³⁷ MDS licensees are also subject to regulatory fees under Section 9 of the Act.⁴³⁸ We collect these fees to recover the regulatory costs associated with our enforcement, policy and rulemaking, user information, and international activities.⁴³⁹ Currently, we do not assess ITFS applicants and licensees with either application fees or regulatory fees. The Commission exempted ITFS from

⁴³¹ See *Public Notice*, Wireless Telecommunications Bureau Answers Frequently Asked Questions Concerning Reporting of Ownership Information on FCC Form 602, DA 99-1001 (May 25, 1999).

⁴³² *Public Notice*, Wireless Telecommunications Bureau to Temporarily Suspend Electronic Filing of FCC Form 430 via the Broadband Licensing System, 17 FCC Rcd 11.131 (2002).

⁴³³ See para. 176*supra*.

⁴³⁴ See *e.g.*, 47 C.F.R. § 27.10; 47 C.F.R. § 101.511 and 101.133

⁴³⁵ *ULS R & O*, 13 FCC Rcd 21027 at Appendix C.

⁴³⁶ 47 U.S.C. § 158.

⁴³⁷ *Id.* § 158(b).

⁴³⁸ 47 U.S.C. § 159

⁴³⁹ 47 U.S.C. § 159(a)

application fees because the original statutory schedule of charges did not provide for fees for ITFS applicants and because ITFS stations were “traditionally used by public service organizations.”⁴⁴⁰

184. In light of the possible changes to the ITFS service that we are proposing in this proceeding, we seek comment on whether ITFS licensees and applicants (or former licensees of the service, if we decide to reclassify ITFS as a new service) should become subject to application fees and regulatory fees, to the extent that such licensees or applicants do not fall within an express statutory exemption.⁴⁴¹ In light of our contemplated changes to the rules, the fact that MDS and ITFS licensees often provide service as part of the same system, and the fact that ITFS licensees can lease up to ninety-five percent of their capacity to other entities (usually MDS licensees), we seek comment on whether there currently is any valid basis for treating MDS and ITFS applicants and licensees differently for fee purposes. We note that under our proposal, those ITFS licensees that are governmental entities would continue to be exempt under the statute from application fees.⁴⁴² We also note that most existing ITFS licensees would likely remain exempt from regulatory fees because they would be covered under the statutory exemptions for governmental entities and nonprofit entities.⁴⁴³ To the extent we change the eligibility criteria for ITFS, however, we propose to require new licensees that are not statutorily exempt to pay regulatory fees. We seek comment on this proposal.

185. We also seek comment on changing the regulatory fees applicable to MDS licensees. Congress has authorized the Commission to add, delete, or reclassify services in the regulatory fee schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.⁴⁴⁴ The instant proceeding proposes major changes to the MDS service, including allowing mobile operation and expediting the use of MDS to provide advanced broadband services. In light of these potential changes, we seek comment on adjusting the regulatory fees for MDS. Currently, we assess MDS stations a regulatory fee of \$450 per station.⁴⁴⁵ We note that converting MDS stations to geographic area licensing would reduce the number of MDS licenses. Furthermore, to the extent MDS stations begin offering mobile services, it may be appropriate to begin assessing these licensees on a per unit basis, as we do for other mobile services.⁴⁴⁶ Accordingly, we seek comment on the appropriate changes to the regulatory fee structure and amount for MDS licensees. To the extent we conclude that ITFS licensees should pay regulatory fees, we tentatively conclude that the regulatory fees for MDS and ITFS licensees should be the same. We seek comment on this tentative conclusion.

⁴⁴⁰ Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Notice of Proposed Rulemaking*, 51 Fed. Reg. 25792 ¶ 68 (1986).

⁴⁴¹ Governmental entities are statutorily exempt from Section 8 fees, and both governmental entities and nonprofit entities are statutorily exempt from Section 9 fees. 47 U.S.C. §§ 158(d)(1), 159(h).

⁴⁴² 47 U.S.C. § 158(d)(1).

⁴⁴³ Compare 47 U.S.C. § 159(h) (exceptions to regulatory fees) and 47 C.F.R. § 74.932 (ITFS eligibility).

⁴⁴⁴ 47 U.S.C. § 159(b)(3). Increases or decreases in fees made by amendments pursuant to this paragraph shall not be subject to judicial review. *Id.*

⁴⁴⁵ 47 C.F.R. § 1.1153.

⁴⁴⁶ See 47 C.F.R. § 1.1152 (CMRS Mobile Services and CMRS Messaging Services).

12. Discontinuance, Reduction or Impairment of Service

186. The Commission implemented its license forfeiture rules to ensure station operation and alleviate concerns about spectrum warehousing.⁴⁴⁷ When considering forfeitures, cancellation and discontinuance of service, an **MDS** licensee has five separate rule sections to review an **ITFS** licensee has three separate rule sections to review.⁴⁴⁸ Because a system can have both **ITFS** and **MDS** channels, we believe that consolidating these rules will be advantageous to both the industry and the Commission staff. We tentatively conclude that consolidating these rules will reduce the confusion of the industry as to the appropriate rules and increase the efficiency of the Commission staff in processing these actions. We propose to move, revise, and consolidate these rules in Parts 1 and 101 of our rules.

187. We note that **MDS** licensees may alternate between providing service as a common carrier or a non-common carrier.⁴⁴⁹ However, before alternating, the licensee must notify the Commission of the change at least thirty days before the change.⁴⁵⁰ Additionally, common carriers who seek to alternate or who otherwise intend to reduce or impair service must notify all affected customers of the planned discontinuance, reduction, or impairment on or before providing notice to the Commission.⁴⁵¹ These provisions concerning licensees alternating between common carrier and non-common carrier status are not in our Part 101 rules. We invite comment on whether we should retain these rules and consolidate them in Part 101.

188. Through these actions, we are proposing above, we are endeavoring to ensure station operation and to alleviate concerns about the warehousing of spectrum in **MDS/ITFS**. The **MDS/ITFS** community, however, has asked us to liberalize the rules on forfeiture of license and discontinuance of service due to the transition of the spectrum to new uses. For instance, the industry has called for a liberalizing of the rules regarding the retention and periodic use of facilities to provide for simpler preservation of downstream authorization for stations operating upstream and to provide for preservation of licenses for channels being used as guard bands.⁴⁵² Therefore, we invite comment on the proposals described in this section. We invite alternate proposals that would allow for flexible use of the spectrum while preserving our policy of ensuring station operation and alleviating concerns about the warehousing of spectrum.

⁴⁴⁷ See Reorganization and Revision of **Parts 1, 2, 21, and 94** of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, **Report and Order**, 11 FCC Rcd 13,449, 13,465 (1996).

⁴⁴⁸ See 47 C.F.R. §§ 21.44; 21.303; 21.910; 21.932; 21.936; 73.3534; 73.3598; 74.932

⁴⁴⁹ See 47 C.F.R. §§ 21.903(d); 21.910.

⁴⁵⁰ See 47 C.F.R. § 21.903(d) which provides that the notification must state whether there is any affiliation or relationship to any intended or likely subscriber or program originator.

⁴⁵¹ See 47 C.F.R. § 21.910 which provides that the notice shall be in writing and shall include the name and address of the carrier, the date of the event, the area(s) affected and the channels that are affected by the event. *Id.* at § 21.910(b).

⁴⁵² Coalition Proposal at 44-45.

13. Foreign Ownership Restrictions

189. Sections 310(a) and 310(b) of the Communications Act, as modified by the Telecommunications Act of 1996, impose foreign ownership and citizenship requirements that restrict the issuance of licenses to certain **applicants**.⁴⁵³ An applicant requesting authorization only for non-common carrier services would be subject to Section 310(a), but not to the additional prohibitions of section 310(b). An applicant requesting authorization for common carrier services would be subject to both Sections 310(a) and 310(b). We do not believe that common carriers and non-common carriers filing an application to operate in this band should be subject to varied reporting obligations. Rather, as a matter of fostering regulatory parity and transparency, we believe that all applicants should be required to file changes in foreign ownership information to the extent required by Part 101 of our **Rules**.⁴⁵⁴ By establishing parity in reporting obligations, however, we do not propose a single, substantive standard for compliance. **For** example, we do not and would not deny a license to an applicant requesting authorization exclusively to provide services not enumerated in Section 310(b), solely because its foreign ownership would disqualify it from receiving a license if the applicant had applied for a license to provide the services enumerated in Section 310(b). We request comment on this proposal.

14. Performance Requirements

190. Incumbents in the 2500-2690 MHz band consist of **MDS** BTA Authorization holders and site-based **ITFS** and **MDS** licensees. In addition, as noted above, we are seeking comment on, among other things, whether geographic licensing for unassigned **ITFS** spectrum would be appropriate. In this section, we discuss the various performance requirements applicable to the categories noted above and seek comment on whether we should retain those requirements or whether we should make changes. We also seek comment **on** the construction benchmarks we should adopt to encourage licensees to deliver service to rural areas. We note that the Communications Act requires **us** to adopt policies to deter spectrum warehousing, promote the rapid development and deployment of new technologies and services, and promote service to rural **areas**.⁴⁵⁵

⁴⁵³ 47 U.S.C. § 310(a), (b).

⁴⁵⁴ 47 C.F.R. §§ 101.7, 1.913, 1.919. Moreover, **as** we observed in the *LMDS 2d R&O*, requiring submission of ownership information that may not be immediately necessary to assess the qualifications of a licensee (i.e., one who currently operates as a non-common carrier) is an efficient and reasonable measure to facilitate the flexibility accorded licensees to change status with a minimum of regulatory interference. With this approach, updated information can be used whenever the licensee changes to common carrier status without imposing an additional filing requirement when the licensee makes the change. Moreover, having access to this ownership information allows the Commission to monitor all of the licensed providers more effectively, in light of their ability to provide both common and non-common carrier services. Rulemaking to Amend Parts I, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and For Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, 12 FCC Rcd 12545 (1997) (*LMDS 2d R&O*).

⁴⁵⁵ "[T]he Commission is required under Section 309 (j) of the Communications Act to include 'safeguards to protect the public interest in use of the spectrum' and performance requirements 'to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.'" *WCS Report and Order*, 12 FCC Rcd. at 10841 (quoting 47 U.S.C. § 309(j)(4)(B)) (footnote omitted).

191. **MDS BTA Authorization Holders.** Currently, MDS BTA authorization holders have a five-year build-out period, which begins on the date of the grant of the MDS BTA authorization and ends on the fifth anniversary of the authorization grant.⁴⁵⁶ This build-out period is not extended by the grant of subsequent authorizations.⁴⁵⁷ Timely certifications of completion of construction for each MDS station within a MDS BTA or partitioned service area must be filed on completion of the construction of a station.⁴⁵⁸ Within five years of a grant of a MDS BTA-authorization, the authorization holder must construct MDS stations to provide signals pursuant to Section 21.907 of the Commission's Rules⁴⁵⁹ that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent MDS stations⁴⁶⁰ and the authorization holder must file sixty days prior to the end of the five-year build-out period that it has met this requirement.⁴⁶¹ If the Commission finds that the authorization holder has met this requirement, the Commission will issue a declaration so stating.⁴⁶² If the Commission finds that the BTA authorization holder did not meet this requirement, the Commission will partition from the BTA any unserved area and will reauthorize service to the unserved area pursuant to the MDS competitive bidding procedures⁴⁶³ and the BTA authorization holder originally authorized to provide service will be ineligible to participate in the auction of the unserved areas.⁴⁶⁴ We seek comment on whether we should retain these requirements as they are, or whether they should be changed or clarified in some way. If they should be changed, commenters should recommend specifically those requirements that should be changed, those that should be clarified, and those that should remain unchanged. In the alternative, we seek comment on whether we should adopt a different approach altogether, such as a substantial service approach. We note that for services that require ubiquitous coverage, the Commission has required that at the time of license renewal each geographic area authorization holder demonstrate that it has made "substantial service" available within its authorized service area.⁴⁶⁵ The Commission has observed that the substantial service standard affords

⁴⁵⁶ See 47 C.F.R. § 21.930(a)(1).

⁴⁵⁷ See 47 C.F.R. § 21.930(a)(2).

⁴⁵⁸ See 47 C.F.R. § 21.930(a)(3).

⁴⁵⁹ 47 C.F.R. § 21.907.

⁴⁶⁰ See 47 C.F.R. § 21.930(c)(1).

⁴⁶¹ See 47 C.F.R. § 21.930(c)(2).

⁴⁶² See 47 C.F.R. § 21.930(d)(1).

⁴⁶³ See 47 C.F.R. § 21.930(d)(2).

⁴⁶⁴ See 47 C.F.R. § 21.930(d)(2)(ii).

⁴⁶⁵ Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, **Report and Order**, 12 FCC Rcd 10785, 10843-45 (1997) (**WCS Report and Order**); **LMDS 2d R&O**, 12 FCC Rcd at 12,659-61, *aff'd Melcher v. FCC*, 134 F.3d 1143, 1161-2 (D.C. Cir. 1998); Amendments to Parts 1, 2, 87, and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, **Report and Order**, 15 FCC Rcd 16934, 16950-52 (2000) (**24 GHz Report and Order**); **39 GHz R&O**, 12 FCC Rcd at 18624-25; Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, ET Docket No. 98-206, **Memorandum Opinion and Order and Second Report and Order**, 17 FCC Rcd 9614, 9684-9685, ¶ 177 (2002) (**MVDDS Memorandum Opinion and Order and Second Report and Order**).

maximum flexibility for authorization holders to offer a range of services and fosters competition.⁴⁶⁶ If we were to adopt a substantial service approach, should we also adopt safe harbors? We ask commenters who believe that we should adopt safe harbors to recommend specific safe harbors. Accordingly, if the Commission adopts a substantial service performance standard, we propose that any licensee who fails to meet the standard with respect to a license will forfeit the license or be ineligible to renew the license pursuant to sections 1.946(c) and 1.955(a)(2) of our rules.⁴⁶⁷ Additionally, we propose to eliminate extension of time requests for MDS BTA Authorization holders who must satisfy a substantial service performance standard. We seek comment on this proposal.

192. **Site-based licensees.** As noted above, we are proposing to provide each incumbent on a current ITFS channel and each MDS incumbent with a PSA based on a circle with a 35-mile radius around its main station. Currently, the rules provide MDS incumbent stations with a maximum construction period of twelve months from the date of the license grant.⁴⁶⁸ We note that the Commission extended the construction period from eight months to twelve months to provide MDS permittees with sufficient time to meet the construction requirements without requesting extensions of time.⁴⁶⁹ ITFS licensees have eighteen months from the date of the issuance of the original construction permit to construct their facilities.⁴⁷⁰ We seek comment on whether we should retain these requirements or

⁴⁶⁶ “Based on the record in this proceeding, we believe that the substantial service standard, in lieu of specific coverage requirements best serves the public interest. In addition to being consistent with the approach used in other wireless services, we believe that this standard is sufficiently flexible to foster expeditious development and deployment of systems and will ultimately create competition among service providers in this band.” 24 *GHz Repon and Order*, 15 FCC Rcd at 16951. “This approach [substantial service] will permit flexibility in system design and market development, while ensuring that service is being provided to the public.” 39 *GHz Report and Order*, 12 FCC Rcd 18624.

⁴⁶⁷ 47 C.F.R. §§ 1.946(c) and 1.955(a)(2). See also 47 C.F.R. § 101.1325.

⁴⁶⁸ See 47 C.F.R. § 21.43(a).

⁴⁶⁹ Revision of Part 21 of the Commission’s Rules, *Notice of Proposed Rulemaking*, CC Docket No. 86-128, 104 F.C.C.2d 116, 125 n.41 (1986). We permit extensions of time to construct when the authorization holder applies for the extension and submits: 1) a verified statement of diligent efforts to construct, and 2a) the delay is due to circumstances beyond the applicant’s control, or 2b) there are unique and overriding public interest concerns. See 47 C.F.R. §§ 21.11(b), 21.40(b). A carrier who does not promptly construct facilities precludes others who are willing and able to construct from access to the spectrum.” See Revision of Part 21 of the Commission’s Rules, *Report and Order*, 2 FCC Rcd 5713, 5721 (1987) (1987 *Repon and Order*). “In order to ensure timely construction of facilities, the Commission announced its intent to enforce strictly construction deadlines . . . when it established a construction period of 12 months.” See also *Miami MDS Co.*, 7 FCC Rcd 4347, 4349 (1992), *aff’d mem*, *Miami MDS Co. v. FCC*, 14 F.3d 658 (D.C. Cir. 1994). Consequently, we do not grant extensions of time for delays caused by the lack of financing or the lack of site availability. See 47 C.F.R. § 21.40(b).

“See 47 C.F.R. § 73.3534(a). The Commission recognized that a one-year period may not be sufficient for ITFS licensees due to the budgeting and scheduling processes for educational institutions could delay the construction of ITFS facilities beyond the one year period.” Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service, *Report and Order*, MM Docket No. 83-523, 98 F.C.C.2d 925, 935 (1984). However, the Commission provided that ITFS licensees could obtain an extension of time to construct by submitting a specific, detailed narrative statement demonstrating that the delay is due to “causes not under the control of the permittee, or upon a specific and detailed showing of other sufficient justification for extension. See 47 C.F.R. § 73.3534(c). An ITFS extension of time applicant must demonstrate that 1) construction is complete and testing of facilities has begun; 2) substantial progress has been made; or 3) reasons clearly beyond the applicant’s control, which the applicant has taken all possible steps to resolve, have prevented (continued....)

whether they should be changed. Do licensees need more time to construct? If licensees need more time to construct, how much is appropriate? Should MDS and ITFS site-based licensees be given the same time to construct? Or are there reasons to treat MDS and ITFS site-based licensees differently?

193. **Geographic area licensing.** As noted above, we seek comment on whether we should license unassigned ITFS spectrum via a geographic area overlay license. If we were to adopt such an approach, we seek comment on whether we should adopt the same performance standard for geographic licensees of unassigned ITFS spectrum as we do for MDS BTA Authorization holders. Are there any reasons that they should be treated differently? In other words, if we decide to retain the current performance requirements for MDS BTA authorization holders, discussed above, should we apply those same requirements to geographic licensees of unassigned ITFS spectrum? Or, if we were to adopt a substantial service standard for MDS BTA Authorization holders, should we adopt that same standard for geographic licensees of unassigned ITFS spectrum? If not, commenters should specify a different approach for geographic area licensee of unassigned ITFS spectrum. Commenters should also state the reason that licensees of unassigned ITFS spectrum should be treated differently than MDS BTA Authorization holders. We note that commenters to the recent *Extension Memorandum Opinion and Order* proceeding consistently advocated the replacement of the current build-out requirement with a substantial service benchmark.⁴⁷¹ Accordingly, if the Commission adopts a substantial service performance standard, we propose that any licensee who fails to meet the standard with respect to a license will forfeit the license or be ineligible to renew the license pursuant to sections 1.946(c) and 1.955(a)(2) of our rules.⁴⁷² Additionally, we propose to eliminate extension of time requests for geographic area licensees who must satisfy a substantial service performance standard. We seek comment on this proposal.

194. **Coalition Proposal.** Although the Coalition did not recommend an overlay approach for licensing unassigned ITFS spectrum, the Coalition did recommend that a transition to a pure geographic licensing system for the Services presents the need and opportunity to adopt revised performance requirements for licensees.⁴⁷³ Instead of continuing to use site-based licensing procedures, the Coalition advocates using a substantial service requirement at the time of renewal, coupled with safe harbors designed to provide licensees with a measure of certainty and an appropriate period for service activation

(Continued from previous page)

construction. See *ITFS Report and Order*, 10 FCC Rcd at 2921. Thus, depending on the circumstances, the lack of funding may warrant an extension of time to construct for an ITFS licensee. See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service Gen. Docket No. 90-54, Gen. Docket No. 80-113, Amendment of Parts 21 and 73 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service. MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Third Order on Reconsideration and Order to Clarify*, 11 FCC Rcd 17003, 17011 (1996).

⁴⁷¹ See e.g. WCA Comments at 7-11 (filed May 9, 2001); Sprint Comments at 2-3 (filed May 9, 2001); WorldCom, Inc. Comments at 4-6 (filed May 9, 2001); Nucentrix Broadband Networks, Inc. Comments at 9-10 (filed May 9, 2001); Hubbard Trust Comments at 5 (filed May 9, 2001); Wireless One of North Carolina, L.L.C. Reply Comments at 1-3 (filed May 16, 2001).

⁴⁷² 47 C.F.R. §§ 1.946(c) and 1.955(a)(2). See also 47 C.F.R. § 101.1325

⁴⁷³ Coalition Proposal at 43.

following adoption of the new rules, for those licensees with early forthcoming license expirations.⁴⁷⁴

195. The Coalition argues that using a case-by-case standard to evaluate MDS and ITFS construction is appropriate. Unlike most other services, they assert that MDS/ITFS system operators will provide service using channels combined from a variety of sources – their own BTA authorized stations, incumbent MDS stations they own, and leased capacity of MDS and ITFS stations licensed to others.⁴⁷⁵ Thus, focusing solely on the population served via stations authorized pursuant to a particular license hardly tells the story as to whether the licensee is providing adequate service to the public.⁴⁷⁶ In fact, they say, the Commission should recognize that in some cases a licensee may not use particular spectrum covered by one license, or certain channels authorized by a license, that is part of a larger operating system at the time of renewal. Instead, the licensee may use the spectrum in the system as a guard band – not used in the classic sense, but they argue a critical component of the system design.⁴⁷⁷

196. Alternatively, they say, the licensed spectrum may not be built-out, but instead the system operator may hold the spectrum for future use as the demands of the operating system expand.⁴⁷⁸ Still licensees may construct other systems for use by particular constituents rather than the general population covered by a GSA.⁴⁷⁹ The Coalition maintains that it is also essential that system operators just launching systems hold spectrum in reserve to address increases in demand and that there is no valid reason to penalize MDS and ITFS licensees for providing that spectrum. Particularly with respect to licenses that come up for renewal in the early years of MDS/ITFS broadband deployment, they assert that a channel-by-channel evaluation will not provide an accurate assessment of service development.⁴⁸⁰ For those reasons, they conclude, the flexibility inherent in the case-by-case application of the substantial service standard provides the Commission with a means of examining the entire picture.⁴⁸¹

197. The Coalition recommends that we clarify that a substantial service evaluation will include not only the service areas of incumbent stations that are directly owned by the entity, which holds the BTA authorization, but also the service areas of incumbent stations owned by any entity controlled by the same ultimate parent company as is the BTA authorization holder.⁴⁸² We seek comment on the Coalition's recommendations.

198. *Rural areas.* We seek comment on whether and how we may use construction benchmarks to encourage licensees to deliver wireless services to rural populations. To what extent are our current construction benchmarks effective in ensuring that spectrum-based services are provided to

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 45

⁴⁷⁶ *Id.* at 47-48.

⁴⁷⁷ *Id.* at 45

⁴⁷⁸ *Id.* at 46

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 45-46.

⁴⁸² Coalition Proposal at 49

rural areas? **In** what instances, and under what circumstances, should the Commission adopt a population-based, geography-based, or substantial service construction benchmark? For example, in licensing service areas that are predominantly rural, should the Commission adopt geography-based construction benchmarks? Are there other types of construction benchmarks that would promote service to rural regions better? For instance, should we adopt a separate construction benchmark applicable only to service areas that constitute rural areas? Alternatively, should we revise our current construction benchmarks to permit service providers to serve either smaller portions of the population or service area if they meet a second construction benchmark applicable to the rural portions of a licensee's market? If so, commenters should explain what construction benchmarks we should adopt for the **rural** portions of the service area and how to determine whether an area is rural? If, as suggested above, we were to require licensees to disaggregate or partition unused spectrum or unserved portions of geographic service areas, should we adopt additional construction benchmarks to implement this requirement? If so, what penalties should the Commission impose on licensees for failure to timely meet such additional construction benchmarks? The Commission has generally accepted certifications of **CMRS** carriers that they have met their construction benchmarks.⁴⁸³ To what extent are our self-certification procedures an adequate means of ensuring compliance with our construction benchmark requirements?

199. *Extension/Suspension of current performance requirements for MDS BTA Authorization holders.* The Coalition requests that we immediately suspend the MDS BTA build-out deadline in Section **21.930**, as extended by the *MDS Build-Out Extension Order*, while our build-out policy for this service remains subject to pending rulemaking proceedings.⁴⁸⁴ We note that on August 16, **1996**, the Commission granted **334** of the **493** BTA authorizations.⁴⁸⁵ As a result, the five-year build-out period for these authorizations ended on August 16, 2001. However, before the end of the build-out period, the former Mass Media Bureau extended the construction deadline for BTA authorizations to August 16, **2003** or the existing build-out date, whichever is later.⁴⁸⁶ The former Mass Media Bureau found that a maximum of two years would be a sufficient amount of time to allow the MDS industry to build-out its facilities and provide new and innovative two-way services to the **public**.⁴⁸⁷ The former **Mass Media Bureau** found that a longer extension period would unreasonably delay MDS entry in both rural and urban markets.⁴⁸⁸ At that time, the former Mass Media Bureau indicated that the Commission would address issues concerning the clarification, modification, or abolishment of the **MDS** BTA requirement in an upcoming rulemaking.⁴⁸⁹

⁴⁸³ See Facilitating The Provision Of Spectrum-Based Services To Rural Areas And Promoting Opportunities For Rural Telephone Companies To Provide Spectrum-Based Services, WT Docket No. 02-381, *Notice of Inquiry*, 17 FCC Rcd 25,554 at ¶ 22 (2002).

⁴⁸⁴ *Id.* at 50; see also paras. 168- 169.

⁴⁸⁵ See Extension of the Five-Year Build-out Period for BTA Authorization Holders in the Multipoint Distribution Service, *Memorandum Opinion and Order*, 16 FCC Rcd 12593, 12594-12595 ¶ 5 (2001). The Commission did not alter the construction deadlines that already fell after August 16, 2003.

⁴⁸⁶ *Id.* at 12593 ¶ 1

⁴⁸⁷ *Id.* at 12,596 ¶ 8.

⁴⁸⁸ *Id.* at 12,596 ¶ 8

⁴⁸⁹ *Id.* at 12,597 ¶ 9.

200. In light of the breadth of the proposals set forth in this *NPRM & MO&O*, and our re-evaluation of performance standards for the 2500 -2690 MHz band, we believe that suspending the current August 16, 2003 construction deadline for BTA authorization holders is in the public interest. While we are normally reluctant to suspend a build-out requirement, a suspension of this construction deadline will allow the Commission to evaluate the performance requirements and service rules for this band. This approach is consistent with prior Commission actions suspending a deadline while relevant policy is subject to the pending rulemaking proceedings.⁴⁹⁰ Accordingly, we will suspend the BTA construction deadline pending the release of a *Report and Order* in this proceeding. We seek comment, however, on how much additional time we should give MDS BTA Authorization holders. Should we toll the time from the release of the *NPRM* until the August 16, 2003 deadline, which is approximately five months and give them an additional five months from the release date of the *Report and Order* in this proceeding? Should we give them eight months from the release of the *Report and Order* in this proceeding? Should we give them an additional two years from the release date of the *Report and Order* in this proceeding?

201. *Extension/Suspension of current performance requirements for site-based licensees.* Moreover, we also believe that it is in the public interest to suspend the construction deadline for ITFS and MDS site-based licensees and permittees that have unexpired licenses or permits that have not expired as of the release date of the *NPRM & MO&O* and that have made a timely filed extension request. We seek comment, however, on whether we should review those timely filed extension requests to construct under our current rules and suspend the construction deadline only for those that comply with the current rules, or whether we should automatically suspend the construction deadline for all timely filed requests for extension of time to construct. If we should automatically grant such requests, how much time should licensees or permittees receive to construct? We seek comment on whether this suspension should also cover licensees and permittees whose requests for extension of time have been denied, but who have timely petitions for reconsideration or applications for review pending. We also request comment on the proper treatment of objections or other pleadings that have been filed against requests for extension of time. We emphasize that the suspension of this construction deadline for site-based licensees does not affect the requirement for such licensees to timely file a renewal application.⁴⁹¹ We stress that all site-based licensees are required to timely file renewal applications or face cancellation of their licenses regardless of the pendency of this proceeding.

202. In light of the changes we are proposing, we seek comment on whether we should continue our current policy with regard to extension requests to construct facilities. If we should continue our current policy, should we make any changes? If so, we seek comment on the specific changes that we should make.

⁴⁹⁰ See, e.g., Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems in Rural Markets, *Order*, 8 FCC Rcd 3974 (1993); Requests by Interactive Video And Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756 (WTB 1998); Requests by Interactive Video and Data Service Auction Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3,181, 3,184 (WTB 1997); Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules, *Memorandum Opinion and Order*, 3 FCC Rcd 7,220, 7,222 (CCB 1988). Cf. *Channel 16 of Rkodel Island, Inc. v. FCC*, 440 F.2d 266, 275-76 (D.C. Cir. 1971).

⁴⁹¹ See, e.g. Daniel R. Goodman, Receiver; Dr. Robert Chan, *Memorandum Opinion and Order and Order on Reconsideration*, 13 FCC Rcd 21,944, 21972-973, 21977 ¶¶ 53, 62 (1998).

15. Annual Reports

203. Our existing rules require **MDS** operators to file annual reports even if they are in full compliance with all of our rules.⁴⁹² We propose to eliminate this requirement because these reports do not appear to serve any purpose.

G. Application Processing

204. Currently, our **MDS** and **ITFS** application processing is cumbersome, time-consuming, and resource intensive. As noted above, we propose to replace the requirement to separately license individual transmitters with a geographic area licensing scheme in which most operations would be authorized under the geographic area license. We believe this change will substantially reduce the burdens on licensees, expedite the initiation of service, and provide greater flexibility. Nonetheless, we note that there will continue to be limited instances in which transmitters will have to be licensed individually. We therefore believe it is appropriate to review and streamline our application procedures.

205. With respect to the processing of **ITFS** applications, our rules require the opening of a filing window before we will accept **applications**.⁴⁹³ Then we must announce a one-week filing period for applications for major changes, high-power signal booster station, response station hub and R channels point-to-multipoint transmissions licenses. At the conclusion of the one-week filing period, we announce the tendering for filing of applications submitted during the filing window and provide a sixty-day filing window for applicants to amend their **applications**.⁴⁹⁴ At the end of the sixty-day filing window, we announce the acceptance for filing of all applications submitted during the initial window, as amended by the **applicants**.⁴⁹⁵ Opposing parties receive sixty days from the release of the public notice announcing the acceptance for filing of the applications to file a petition to deny against an **application**.⁴⁹⁶

On the sixty-first day, we grant the unopposed applications unless we notified the applicant that we were not granting the application. We are concerned that this process may result in delays to the public and hinders the efficient processing of **ITFS** applications. We seek comment on whether this concern is valid. Additionally, if this concern is valid, we seek comment on measures we may implement to streamline this process.

206. Although our **MDS** application processing procedures are different from the **ITFS** procedures, we seek comment on whether we should consolidate the **MDS** and **ITFS** application procedures. Generally, upon receipt of an **MDS** application, we give the application a file number.⁴⁹⁷ After preliminary review, we place those applications that appeared complete on public notice as

⁴⁹² 47 C.F.R. § 21.911

⁴⁹³ See 47 C.F.R. § 74.911(c)(1), (d).

⁴⁹⁴ See 47 C.F.R. § 74.911(d) (amendments were permissible as long as they did not result in any increase in interference to any previously-proposed or authorized station, or to facilities proposed during the window, absent consent of the applicant for or licensee of the stations that would receive the additional interference).

⁴⁹⁵ See *id.*

⁴⁹⁶ See *id.*

⁴⁹⁷ See 47 C.F.R. § 21.26

accepted for filing.⁴⁹⁸ However, with regard to MDS two-way application filings, we currently use a rolling one-day filing window.⁴⁹⁹ We announced the "tendering for filing" of applications submitted during the filing window.⁵⁰⁰ After a sixty-day period, we released a second public notice announcing those applications that we accepted for filing.⁵⁰¹ Although the MDS application filing procedures appear quicker, we are concerned that these procedures can be stream-lined as well. Accordingly, we seek comment on whether we should stream-line the MDS application procedures. If so, we seek comment on methods to stream-line these procedures and where possible to consolidate the procedures.

207. Previously, applicants could file and view their applications on-line using the Broadband Licensing System (BLS).⁵⁰² The BLS contained the licensing data for MDS and ITFS.⁵⁰³ The public could access the BLS via the Internet.⁵⁰⁴ This on-line access enables users to search and display MDS and ITFS application and station information including Internet display of granted station authorizations.⁵⁰⁵ Users could also view filed applications in the electronic format.⁵⁰⁶

208. On October 11, 2002, the Wireless Bureau suspended the electronic filing capabilities of the BLS in order to improve the integrity of data in the BLS, prepare for converting the ITFS and MDS services to the ULS, and facilitate future enhancements to electronic filing.⁵⁰⁷ Although the BLS had some on-line capabilities, we believe that conversion of the data from BLS to ULS will improve the efficiency of filing applications, as well as searching for data on these services.

209. In this vein, we note that we require the majority of the wireless applicants to file their applications electronically using ULS. The ULS has eliminated the need for wireless carriers to file duplicative applications and has increased the accuracy and reliability of licensing information for

⁴⁹⁸ See *id.* Neither the assignment of a file number nor the listing on a public notice as accepted for filing indicates that the application has been found acceptable for filing or precludes the subsequent return or dismissal of the application if it is found defective or not in substantial compliance with the Commission's rules. *Id.*

⁴⁹⁹ See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-way Transmissions, *Report and Order*, MM Docket No. 97-217, 13 FCC Rcd 19112, 19150 (1998); 47 C.F.R. § 21.27(d).

⁵⁰⁰ Commission Announces Initial Filing Window for Two-way Multipoint Distribution Service and Instructional Television Fixed Service, *Public Notice*, 15 FCC Rcd 5,850 (MMB 2000).

⁵⁰¹ 47 C.F.R. § 21.27(d).

⁵⁰² *Public Notice*, Mass Media Bureau Implements, May 30, 2000 (*BLS Implementation PN*)

⁵⁰³ *Id.*; see also, Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice*, 17 FCC Rcd 18,365 (2002) (*Electronic Filing Suspension PN*).

⁵⁰⁴ *BLS Implementation PN*.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Electronic Filing Suspension PN*, 17 FCC Rcd at 18,365. We note that effective March 25, 2002, the Commission transferred the regulatory functions for the Services from the former Mass Media Bureau to the Wireless Telecommunications Bureau. Radio Services are Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002).

wireless services. Additionally, ULS has increased the speed and the efficiency of the application process because wireless licensees and applicants can file all licensing-related applications and other filings electronically. Since the implementation of ULS, the public may access all publicly available wireless licensing information on-line.⁵⁰⁸ Because ULS is interactive, ULS prompts the applicant to input the required information for the type of action that the applicant seeks. As a result, applicants must submit all the appropriate information before they may file their applications electronically in ULS.⁵⁰⁹ Notably, ULS will automatically "pre-fill" licensee information already in the system and will display only the portions of the form and schedules that require completion for the applicant's or licensee's indicated purpose.⁵¹⁰

210. The Commission also created redundant systems and back up procedures to safeguard against loss of data or system access should a system failure occur.⁵¹¹ We believe that transitioning MDS and ITFS to ULS will have the same benefits for MDS and ITFS carriers, the public and the Commission. Accordingly, we seek comment on the changes needed to transition MDS and ITFS to ULS.

211. In light of the interactively nature of ULS to assist an applicant through the application process, we propose to streamline the licensing process.⁵¹² Generally, upon filing of an application in ULS, we place the application on public notice as accepted for filing.⁵¹³ The extra step of allowing applicants to amend their applications to make corrections is not necessary with ULS. We seek comment on this proposal. In addition to the concerns noted above with regard to streamlining the ITFS and MDS application processes, we tentatively conclude that the interactive nature of ULS will enhance the on-line capabilities of MDS and ITFS users. Accordingly, we propose to integrate the Services into ULS. We seek comment on this proposal.

1. Returns and Dismissals of Incomplete or Defective Applications

212. As noted above, in some instances ITFS and MDS applicants submitted applications that were incomplete or required the submission of additional information before they could be placed on public notice as accepted for filing. We propose to extend our uniform rule for dismissal or return of defective applications in the Wireless Services to ITFS and MDS applications.

⁵⁰⁸ ULS R&O, 13 FCC Rcd 21027,21031 ¶ 4.

⁵⁰⁹ Phase I Mandatory Electronic Filing Deadline Extended for PCIA and ITA, Public Notice, 16 FCC Rcd 13,681 (2001) (the Commission extended the deadline for mandatory electronic filing to July 25, 2001).

⁵¹⁰ On-line help, including form instructions, is provided for electronic filers. Additionally, the FCC Technical Support Hotline is available Monday through Friday, 8 a.m. to 6 p.m. *All calls to the FCC Technical Support Hotline are recorded.* Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for Five C and F Block Broadband Personal Communications Services (PCS) Licenses, Public Notice, (DA 02-3585, rel. Dec. 24, 2002), Attachment B.

⁵¹¹ ULS R&O, 13 FCC Rcd 21027,21031 ¶ 5

⁵¹² See paras. 208-209 *supra*

⁵¹³ See 47 C.F.R. § 1.933(1)

'''See paras. 204-205 *supra*.

213. In the *ULS Report and Order*, the Commission adopted a uniform application dismissal and return rule in all the Wireless Services.” Pursuant to the uniform rule, the Commission indicated that it has the discretion to return applications for correction on minor filing errors, but it also has the authority to dismiss any incomplete or defective application without **prejudice**.⁵¹⁶ However, the Commission explained that it would automatically dismiss any application that is defective because the applicant failed to sign the application, failed to pay the required filing fee, or filed outside of the applicable filing window.” The Commission concluded that, in contrast to minor filing errors, such defects were “fatal to the consideration of the **application**.”⁵¹⁸ Accordingly, the Commission found that, regardless of the manner in which applicants submitted their applications, ULS would automatically dismiss “applications that were unsigned, untimely, or not fee-compliant.”⁵¹⁹

214. The Wireless Bureau announced specific procedures for complying with the Commission’s uniform **policy**.⁵²⁰ The Wireless Bureau explained that, “[g]enerally, timely filed renewal applications and construction notifications that are otherwise defective will be returned to the applicants for correction, rather than dismissed by the Bureau.”” However, the Bureau clarified “that renewal applications and construction notifications that fail to comply with the applicable fee and signature requirements will be dismissed by the Bureau as defective, rather than returned to the applicants for correction, even if timely **filed**.”⁵²² We propose to adopt this application dismissal and return policy for MDS and **ITFS** to ensure efficient processing and equal treatment of all applications. We invite comment on this proposal.

2. ULS Forms

215. The Commission consolidated the ULS application **forms** for wireless services to replace approximately forty-one application forms.” The consolidation streamlined the processing of applications and reduced the filing burden for wireless applicants and licensees.⁵²⁴ We use four forms in ULS – Form 601 (Long-Form or FCC Application for Wireless Telecommunications Bureau Radio

⁵¹⁵ See *ULS R&O*, 13 FCC Rcd 21,027; See also 47 C.F.R. § 1.934

⁵¹⁶ *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90

⁵¹⁷ *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90

⁵¹⁸ *Id.*

⁵¹⁹ See, e.g., *id.*

⁵²⁰ See *Wireless Telecommunications Bureau Clarifies Unified Policy for Dismissing and Returning Applications, Public Notice*, 17 FCC Rcd 30 (WTB 2001) (*Unified Dismissal and Return PN*); *Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings, Public Notice*, 14 FCC Rcd 11182, 11185 (WTB 1999); *Wireless Telecommunications Bureau Announces Unified Policy for Dismissing and Returning Applications and Dismissing Pleadings Associated with Applications, Public Notice*, 14 FCC Rcd 5499 (WTB 1999).

⁵²¹ *Unified Dismissal and Return PN*, 17 FCC Rcd at 30.

⁵²² *Id.* at 32.

⁵²³ *ULS R&O*, 13 FCC Rcd 21,027, 21,033-21,034 ¶ 10

⁵²⁴ *Id.*

Service Authorization), Form 602 (FCC Ownership Disclosure Information for the Wireless Telecommunications Bureau), Form 603 (FCC Wireless Telecommunications Bureau Application for Assignment of Authorization or Transfer of Control) and Form 605 (Quick-Form Applications for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services).⁵²⁵ Currently, our rules require MDS and ITFS applicants to use eleven forms to request licensing actions.⁵²⁶ We tentatively conclude that we will use the ULS forms to license the Services. Accordingly, we seek comment on the changes to the forms that will be needed to accommodate these Services. In the paragraphs that follow, we delineate the purposes of the specific ULS forms and the forms that they will replace.

216. **FCC Form 601.** Under our proposal, this form will replace FCC Forms 304, 304A, 330, 330A, 330R, 331, **405**, 701 and most informal application filings. The FCC Form 601 and associated schedules will be used to apply for initial authorizations, modifications (major and minor) to existing authorizations, amendments to pending applications, renewals of station authorizations, developmental authorizations, special temporary authorities (STAs), certifications of construction, requests for extension of time, cancellations, and administrative updates. The required schedules are:

- New/Modification/Amendment (Regular Authorizations, Developmental Authority and Special Temporary Authority) – FCC Form 601 Main Form with required technical schedule.
- Renewals/Cancellation/Administrative Updates – FCC Form 601 Main Form and Schedule **A** (if requesting multiple call signs).’’
- Certifications of Construction – FCC Form 601 Main Form and Schedule **K**.
- Extension of Time to Construct – FCC Form 601 and Schedule **L**.

217. **FCC Form 602.** This form will replace the FCC Form 430 for the submission of initial and updated ownership information for those wireless radio services that require the submission of such information.⁵²⁸

218. **FCC Form 603.** This form will replace FCC Forms 305, 306 and 330. Applicants use the FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. Additionally, applicants use the form to apply for partial assignments of authorization, including partitioning and disaggregation. The required schedules are:

- Assignment/Transfer of Control – FCC Form 603 Main Form and Schedule A for auctionable services?’’

⁵²⁵ *Id*

⁵²⁶ The MDS and ITFS application forms are FCC Forms 304, 304A, **305, 306, 330, 330A, 330R, 331, 405, 430,** and **701**.

⁵²⁷ See 47 C.F.R. § 1.949 for the rules governing renewals

⁵²⁸ See *supra* n.415; 47 C.F.R. § 0.408.

⁵²⁹ See 47 C.F.R. § 1.948.

- Partitioning & Disaggregation – FCC Form 603 Main Form and Schedule B or Schedule D as required.
- Consummation Notifications – FCC Form 603 and Schedule D.
- Extension of Time for Consummation – FCC Form 603 and Schedule E.

219. We believe that eliminating the current MDS and ITFS forms and implementing the ULS forms for MDS and ITFS will streamline the processing of applications and reduce the filing burden for MDS and ITFS applicants and licensees. We note that by using the ULS Forms, we will eliminate a number of obsolete MDS and ITFS forms from our rules.⁵³⁰ Accordingly, we propose to use the ULS forms for MDS and ITFS, thereby eliminating the current MDS and ITFS forms. We seek comment on this proposal.

3. Transition Periods

220. In light of the significant changes proposed to the ITFS and MDS forms and rules, we believe applicants and licensees should receive a transition period to familiarize themselves with ULS and begin using ULS forms. Accordingly, we propose to allow continued use of the current ITFS and MDS forms for a transition period of six months after the effective date of the release of a **Report and Order** in this proceeding. This period will provide ITFS and MDS applicants and licensees with sufficient time to familiarize themselves with ULS and to plan an orderly transition from using existing forms to using the ULS forms. At the conclusion of this period, we tentatively conclude that we will accept ULS forms only for these Services. This period is consistent with the transition period the Commission used with the initial implementation of ULS.⁵³¹

221. In the *ULS R&O*, the Commission provided a transition period for applicants and licensees to use ULS voluntarily before implementing mandatory electronic filing using the ULS forms.⁵³² Generally, the Commission determined that permitting a six-month transition period after application processing in ULS begins for a service before requiring mandatory electronic filing was appropriate.⁵³³ We believe the six-month transition period has worked reasonably well for the other services that have transitioned to ULS.⁵³⁴ Accordingly, we tentatively conclude that we will permit a six-month transition period after application processing in ULS begins before requiring mandatory electronic filing by MDS and ITFS applicants and licensees in ULS is appropriate. We invite comment on this tentative conclusion. As in the past, the Wireless Bureau will release a public notice announcing the relevant commencement date for the processing of the Services applications in ULS.⁵³⁵

⁵³⁰ See e.g. 47 C.F.R. §§ 73.3500, 73.3536 (elimination of all references to FCC Form 330-L, “Application for Instructional Television Fixed Station License”); 47 C.F.R. §§ 21.11(b); 73.3500; 73.3533(b) (elimination of all references to FCC Form 307). In addition, we propose to delete references to obsolete MDS forms mentioned in Part 74. See 47 C.F.R. § 74.991.

⁵³¹ *ULS R&O*, 13 FCC Rcd at 21027, 21038-21039 ¶ 16.

⁵³² *Id.* at 21042-21043 ¶ 24.

⁵³³ *Id.*

⁵³⁴ *ULS R&O*, 13 FCC Rcd 21027 (1998) at 21042-3, ¶ 22-4.

⁵³⁵ See, e.g., *Public Notice*: Wireless Telecommunications Bureau to Begin Use of Universal Licensing System (ULS) for Microwave Services (DA 99-154, rel. Aug. 30, 1999).

222. We anticipate that ITFS and MDS operators will find the application and renewal process with the ULS to be easier and less error-prone than with the existing system. Before implementing the electronic ULS, the Commission established a task force to receive public input on the design of the system and to coordinate efforts. Consistent with the WTB's approach in implementing other services into ULS, Commission staff will conduct interactive demonstrations for licensees and their representatives on the proper use of the system for filing license applications and conducting database research. Such demonstrations will be announced by public notice and will include topics such as: (1) finding information in ULS for license and application searches; (2) filing and researching license transfers and assignments; and (3) general application filing procedures.

223. We also note that the WTB has ongoing initiatives designed to familiarize Commission licensees with the ULS and give notice of upcoming changes thereto. For instance, the WTB periodically updates its "ULS Newsletter" on the WTB web site to provide the public with current information on ULS and related topics of interest.⁵³⁶ The WTB maintains an electronic mail list of interested parties, which are provided with updated ULS information free of charge. The WTB also maintains a toll-free phone line⁵³⁷ to assist with licensing questions during the ULS transition and has established a technical support hotline (and e-mail address)⁵³⁸ to assist the public with computer-related issues, including set-up and configuration.

224. To ensure that existing and potential licensees will be comfortable with the integration of MDS and ITFS into the ULS, we intend to pursue a variety of outreach efforts similar to those we have followed in the past when bringing new classes of licenses into the ULS. The WTB has operated booths at many industry trade shows, providing hands-on training regarding use of the Commission's ULS and auction bidding software over the Internet. The Commission's outreach program also includes a web page and telephone hot lines. Members of the Commission and its staff have spoken at numerous industry, trade association, public interest organization, and telecommunications user group conferences on opportunities in wireless services licensed by the Commission, and will continue to do so.⁵³⁹ We also solicit comment on additional means by which we can afford MDS and ITFS licensees opportunities to become educated about and familiar with ULS and the new application procedures we adopt in this proceeding.

225. We note that the MDS/ITFS community requests clarification that it may use the FCC Form 331 for all modification applications for existing stations, whether main stations, boosters, or response station hubs, and that it should use the FCC Forms 304 and 330 only for applications for new stations.⁵⁴⁰ Although the MDS community seeks a clarification that it may use FCC Form 331 to modify existing stations, whether main stations, booster stations or response stations, we believe that MDS

⁵³⁶ See *Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, 15 FCC Rcd. 15,376, 15,408, ¶ 77 (2000) ("*Section 257 Report*"). A list of FCC Public Notices concerning ULS is available on the WTB ULS Homepage at www.fcc.gov/wtb/uls.

⁵³⁷ The toll-free number regarding ULS questions is 1-888-CALL-FCC, option 2

⁵³⁸ The Technical Support telephone no. is 202-414-1250 and the e-mail address for ULS technical questions is ulstech@fcc.gov.

⁵³⁹ See *Section 257 Report* at 15,407-15,408, ¶ 76

⁵⁴⁰ Memorandum to WCA Government Relations Committee from Paul J. Sinderbrand, Esq., Petition for Rulemaking - Amendment of Parts 21 and 74, page 3, August 1, 2001.

applicants should use **FCC Form 601**, upon adoption of final rules, to ensure a smooth transition to ULS. We seek comment on this concern.

4. Suspension of Acceptance and Processing of Applications

226. In light of our actions described above, and effective as of the date of the release of this *NPRM & MO&O*, we will suspend acceptance of applications for **ITFS** channels for new licenses, amendments or modifications for any kind of station temporarily, except as provided below. The suspension is effective until further notice and applies to applications received on or after the date of release of this *NPRM & MO&O*. Any such applications received after the deadline will be returned as unacceptable for filing. We take this action to permit the orderly and effective resolution of issues in this proceeding. Absent this action, applications for new licenses, amendments, and modifications might limit the effectiveness of the decisions made and the standards developed in this proceeding. We note this action is consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area **licensing**.⁵⁴¹ We therefore find that this temporary measure is in the public interest.

227. Notwithstanding this temporary suspension, we will continue to process applications for **ITFS** channels that involve minor modifications, assignment of license or transfer of control.⁵⁴² This exception should permit modifications that can improve the efficiency of incumbent operations on these channels without affecting the effective and orderly resolution of the issues in this proceeding. Again, we will continue to accept applications for minor modifications, license assignments and transfers of control under existing procedures.

228. With respect to pending **ITFS** applications that were filed prior to the release date of this *Notice of Proposed Rulemaking*, and which are pending, we will process such applications provided that they are not mutually exclusive with other applications as of the deadline stated above. We believe that this approach gives the appropriate consideration to those applicants who filed applications prior to our proposed changes and whose applications are not subject to competing applications. We note that we used this approach in other services where we have proposed a transition to geographic area **licensing**.⁵⁴³

If applicants have filed settlement agreements prior to the release date of the *Notice of Proposed Rulemaking*, and such settlement agreements comply with our rules, we will act on the settlement agreements. If we approve such a settlement agreement, we will allow the processing and grant of the remaining non-mutually exclusive applications. We will not accept settlement agreements relating to mutually exclusive **ITFS** applications that are filed after the release date of this *Notice of Proposed Rulemaking*. With respect to applications for **ITFS** stations filed prior to the adoption of this *Notice of*

⁵⁴¹ See e.g., Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rule Making*, WT Docket No. 96-18, PP Docket No. 93-253, 11 FCC Rcd 3108 (1996). See also, Amendment of the Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 FCC Rcd 7913 (1997).

⁵⁴² The Commission reserves the right to classify amendments as major or minor on a case-by-case basis. Unless the Commission determines otherwise in a specific case, a minor amendment is an amendment that does not fall within the Commission's definition of a major amendment, which is codified at 47 C.F.R. §21.23(c). See also n.371.

⁵⁴³ See, e.g., Amendment of the Commission's Rules Regarding Maritime Communications, PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 16949, 17015-17016 (1997).

Proposed Rulemaking that do not meet the above criteria, we tentatively conclude that we will dismiss such applications without prejudice upon adoption of a *Report and Order* in this proceeding. Any commenters proposing that we retain such applications should address how such applications should be processed, particularly in the event of any auction for spectrum covered by the *application*.⁵⁴⁴ This action would be consistent with our treatment of pending applications in other services that we have converted to geographic area *licensing*.⁵⁴⁵ While we are proposing to convert *ITFS* to geographic area licensing, the pending applications were filed in response to a site-based licensing scheme. We seek comment on this tentative conclusion.

229. These decisions are procedural in nature and therefore not subject to the notice and comment and effective date requirements of the Administrative Procedure Act.⁵⁴⁶ Moreover, there is good cause for proceeding in this manner: to do otherwise would be impractical and contrary to the public interest because compliance would undercut the purpose of these interim *measures*.⁵⁴⁷ It is well-established that the Commission *may* initiate a freeze without prior notice and hearing when the purpose is the “creation of conditions under which formal rulemaking proceedings can be held in an effective, efficient, and meaningful *manner*.”⁵⁴⁸ In this particular instance, we are undertaking a comprehensive review of the services to provide licensees maximum operational flexibility with minimal regulatory restrictions. Because we seek comment on virtually every area related to the services, we believe that it is appropriate to suspend the acceptance and processing of applications.

H. Competitive Bidding Procedures

230. *Competitive Bidding Authority*. As discussed earlier in this *NPRM & MO&O*, the Commission determined in prior proceedings that the statutory mandate to use competitive bidding to resolve mutually exclusive applications for licenses applies to *MDS*⁵⁴⁹ and *ITFS*⁵⁵⁰ applications under

⁵⁴⁴ See, *infra*, para. 231, regarding participation in auctions for licenses to use *ITFS* spectrum in currently unassigned areas.

⁵⁴⁵ See, e.g., Amendment of the Commission’s Rules Regarding Maritime Communications, PR Docket No. 92-257, *Second Memorandum Opinion and Order and Fifth Repon and Order*, 17 FCC Rcd 22585, 6720 ¶ 83 (2002).

⁵⁴⁶ See 5 U.S.C. §§ 553(b)(A), (d); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

⁵⁴⁷ See 5 U.S.C. §§ 553(b)(B), (d)(3).

⁵⁴⁸ See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 Bands, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, PP Docket No. 93-253, 12 FCC Rcd 2910, 2915 ¶ 10 citing *Kessler v. FCC*, 326 F. 2d 673, 679-81 (D.C. Cir. 1963).

⁵⁴⁹ See *supra*, para. 22

⁵⁵⁰ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, *First Report and Order*, 13 FCC Rcd 15,920, 15,998-16,004 (1998) (“*Competitive Bidding for ITFS Licenses First Repon and Order*”), *recon. granted in part. Memorandum Opinion and Order*, 14 FCC Rcd 8,724 (1999) (in relevant part, granting *ITFS* applicants in future auctions a post-short-form settlement period and clarifying that the new entrant bidding credit will not be applied in any *ITFS* auction), *and rule modified in part*, 14 FCC Rcd 12,541 (continued...)

current service rules. As the Commission recognized, Congress has mandated expressly that “if ‘mutually exclusive applications are accepted for *any* initial license or construction permit, then, *except as provided in paragraph* (2) [of 47 U.S.C. §309(j)], the Commission *shall* grant the license or permit to a qualified applicant through a system of competitive *bidding*.’”⁵⁵¹ The Commission originally concluded that neither MDS nor ITFS come within any of paragraph 2’s exceptions for “public safety radio services;” for initial digital television licenses given to existing broadcast licenses to replace analog televisions licenses; and for “noncommercial educational broadcast” and “public broadcast” stations, as those terms are defined in 47 U.S.C. §397(6).⁵⁵² The changes proposed in this *NPRM & MO&O* will not bring MDS or ITFS licenses within any of these exceptions, which Congress has not changed or expanded. Accordingly, we must use competitive bidding to resolve mutually exclusive applications for licenses in these bands.

231. *Participation in Auctions for Licenses to Use ITFS Spectrum in Currently Unassigned Areas.* What parties may participate in an auction for licenses to use ITFS spectrum in currently unassigned areas is a distinct question from what parties should be eligible to hold ITFS spectrum licenses.⁵⁵³ Citing prior Commission proceedings, the Coalition proposes that participation in such an auction should be limited solely to parties with pending applications for licenses associated with unassigned ITFS spectrum.⁵⁵⁴ Previously, the Commission observed that “it would not serve the public interest to accept additional competing ITFS applications despite our authority to do so under Section 309(j)(1),” and therefore the only “eligible bidders in any auction of the pending ITFS applications” ought to be “those with applications already on file.”⁵⁵⁵ However, this prior observation applied solely with respect to “any auction of the *pending ITFS applications*.” Pursuant to this *NPRM & MO&O*, and consistent with the Coalition proposal, we now are considering an auction of new licenses for using ITFS spectrum in geographic areas that will encompass currently unassigned areas. As noted previously, geographic area licensing will give licensees greater operational flexibility to modify, move, and add to their facilities, which may improve spectrum utilization.⁵⁵⁶ In addition, this greater operational flexibility may result in new and competing proposals for utilizing the public spectrum resource from parties not previously involved in pending site-based licensing applications. Applicants intending very different uses of these more flexible licenses can express the respective values a particular license has for their intended use in easy to compare competitive bids. This enables the Commission rapidly to assign licenses to parties that will put them to their highest value use. However, an auction must be open to all parties qualified to use the license in order to assign the license to the party that most highly values it.⁵⁵⁷ We seek comment on whether the Commission should adopt the Coalition’s plan or open participation to

(Continued from previous page) _____

(1999) (modifying rules regarding attribution of ownership for determining eligibility for new entrant bidding credit).

⁵⁵¹ *Competitive Bidding for ITFS Licenses First Report and Order*, 14 FCC Rcd at 15,999 n.245 (quoting and adding emphasis to 47 U.S.C. § 309(j)(1)).

⁵⁵² See 47 U.S.C. § 309(j)(2).

⁵⁵³ See *supra*, paras. 107-117

⁵⁵⁴ White Paper at 41 and n.111 (quoting 13 FCC Rcd at 16.002).

⁵⁵⁵ *Id*

⁵⁵⁶ See *supra*, para. 62.

⁵⁵⁷ See generally Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report And Order*, 9 FCC Rcd 2348, 2360-2361, ¶¶ 70-71 (1994).

any party eligible to hold a geographic license. We note that, in either case, if the Commission determines that only educational institutions may hold ITFS licenses, then only those institutions may participate in any auction of ITFS licenses. We further seek comment on any special challenges associated with governmental educational institutions or non-governmental non-profit educational institutions participating in auctions. Commenters proposing that auction participation be restricted to fewer than all parties eligible to be licensees should address how any such restrictions are consistent with the statutory policy objectives of the Commission's competitive bidding authority.⁵⁵⁸

232. Potential Auctions. As discussed further below, we seek comment on three alternative potential auctions: an auction of new licenses to use ITFS spectrum in currently unassigned areas; a two-sided auction to restructure the ITFS spectrum with new licenses; and a two-sided auction to restructure the MDS and ITFS spectrum with new licenses. The term "two-sided auction" generally refers to auctions with multiple sellers and buyers. It is used here to refer to a Commission auction of licenses that makes available rights to previously unassigned spectrum, held by the Commission, and rights to spectrum previously licensed. In such a "two-sided auction," incumbent licensees may bid on licenses that include licenses associated with spectrum previously licensed to them. As discussed further below, a restructuring auction would attempt to further the public interest in efficient and intensive use of the spectrum by bringing together all parties that may have an interest in rights in the ITFS and MDS spectrum, including incumbent licensees and prospective new licensees. Each of the potential auctions would include licenses to use ITFS spectrum in currently unassigned areas and, accordingly, procedures proposed for the auction of such licenses will apply to any of the three potential auctions, with modifications noted below for two-sided auctions in the latter two cases.

I. An Auction of Currently Unassigned ITFS Spectrum

233. Auction Procedures. We request comment on a number of issues relating to Competitive bidding procedures that could be used to assign licenses by auction for ITFS spectrum in areas not covered by any incumbent licenses. If we decide on any auction approach, we propose to conduct any auction of licenses to use spectrum in the **2500-2690 MHz** band in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules, and substantially consistent with the bidding procedures that have been employed in previous auctions.⁵⁵⁹ Specifically, we propose to employ the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.⁵⁶⁰ Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our Part I proceeding.⁵⁶¹ In addition, consistent with current practice, matters such as the appropriate competitive

⁵⁵⁸ See 47 U.S.C. § 309(j)(3).

⁵⁵⁹ See, e.g., Amendment of Part I of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997); *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part I Third Report and Order*); *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*recon. pending*) (*Part I Recon Order/Fifth Report and Order and Fourth Further Notice of Proposed Rule Making*); *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Eighth Report and Order*, 17 FCC Rcd 2962 (2002).

⁵⁶⁰ See 47 C.F.R. § 1.2101 *et seq.*

⁵⁶¹ See *Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000); see also *Part I Recon Order/Fifth Report and Order*, 15 FCC Rcd 15293 (*recon. pending*).

bidding design for the auction of **ITFS** licenses, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.⁵⁶² We seek comment on whether any of our Part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of **ITFS** licenses.

234. Designated Entities. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”⁵⁶³ In addition, section 309(j)(3)(B) of the Act provides that in establishing eligibility criteria and bidding methodologies, the Commission shall promote “economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”⁵⁶⁴

235. The Commission’s existing designated entity provisions apply based on an entity’s qualification as a small business.⁵⁶⁵ We note that minority- and women-owned businesses and rural telephone companies that qualify as small businesses may take advantage of the special provisions we have adopted for small businesses.⁵⁶⁶ We seek comment on whether our small business provisions are sufficient to promote participation by business owned by minorities and women, as well as rural telephone companies.⁵⁶⁷ To the extent that commenters propose additional provisions to ensure participation by minority- or women-owned businesses, or rural telephone companies, they should address how such provisions should be crafted to meet the relevant constitutional standards.

236. We seek comment on the appropriate definition(s) of small business that should be used to determine eligibility for bidding credits in auctions involving **ITFS** spectrum. In the *Competitive*

⁵⁶² See Amendment of Part 1 of the Commission’s Rules - Competitive Bidding Procedures, *Third Repon and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448-49, 454-55, ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the Balanced Budget Act of 1997) (*Parr 1 Third Repon and Order*).

⁵⁶³ See 47 U.S.C. § 309(j)(4)(D).

⁵⁶⁴ See 47 U.S.C. § 309(j)(3)(B).

⁵⁶⁵ See 47 C.F.R. § 1.2110(a). Although the Commission previously extended designated entity preferences to minority- and women-owned businesses, as well as to small businesses, following the Supreme Court’s rulings in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *United States v. Virginia, et al.*, 518 U.S. 515 (1996), the Commission concluded that it would not be appropriate to adopt special provisions for minority-owned and women-owned businesses pending the development of a more complete record on the propriety of race- and gender-based provisions for future auctions. See *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15318-20, ¶¶ 45-50 (discussing constitutional standards and governmental interests that would justify the use of race- or gender-based preferences).

⁵⁶⁶ See *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15319, ¶ 48; see also FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 at 29 (rel. Oct. 9, 1997) (finding that special provisions for small businesses also increase opportunities for minority- and women-owned businesses).

⁵⁶⁷ We recently issued a Notice of Inquiry seeking information about the effectiveness of our provisions to promote participation by rural telephone companies in our competitive bidding proceedings. See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Inquiry*, FCC 02-325 (rel. Dec. 20, 2002).

Bidding Second Memorandum Opinion and Order, the Commission stated that it would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.⁵⁶⁸ The *Part 1 Third Report and Order*, while it standardizes many auction rules, provides that the Commission will continue a service-by-service approach to defining small businesses.⁵⁶⁹ Generally, when establishing service-specific small business size standards, we look to the capital required to provide likely service using the spectrum. We do not know the precise type of service that new licensees may attempt to provide in this band. The Coalition has suggested that the ITFS and MDS bands may be used to provide ubiquitous broadband services using next generation low power, cellular systems on fixed, portable and/or mobile bases.⁵⁷⁰ We invite comment on whether likely services in this band will have capital requirements similar to current MDS services; or similar to mobile services, such as Personal Communications Services; or similar to fixed services, such as services in the 24 GHz and 39 GHz bands.

237. Further, we invite comment on whether distinctive characteristics of licensees in the ITFS band require distinct rules for assessing the relative size of potential participants in an ITFS auction. In this regard, current ITFS eligibility rules would limit participation in an auction of ITFS licenses for which there are mutually exclusive applications to accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, and nonprofit educational organizations providing educational and instructional television materials to such accredited institutions or governmental organizations.⁵⁷¹ How do our designated entity provisions comport with the unique challenges and status of educational institutions? Should we establish special provisions for non-profit educational institutions that may want to have access to ITFS spectrum but do not have the financial capability to compete in an auction for spectrum licenses? Commenters that propose special provisions for non-profit educational institutions should address the statutory basis for such proposals. Our standard schedule of small business bidding credits provides for bidding credits based on a calculation of bidders' average annual gross revenues for the three years preceding the auction.⁵⁷² We seek comment on whether the noncommercial character of current ITFS licensees requires any special procedures for determining the average annual gross revenues of such entities. For example, are our standard gross revenue attribution rules an appropriate method of evaluating the relative resources of universities and government entities? We also invite comment on whether some other criterion besides average annual gross revenues should be used for identifying small entities among eligible ITFS applicants.

238. Similarly, if current or revised licensee eligibility rules significantly limit parties eligible to participate in an ITFS auction, would distinguishing among eligible entities to grant bidding credits to

⁵⁶⁸ Implementation of Section 309(j) of the Communications Act--Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7269 ¶ 145 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*); 47 C.F.R. § 1.2110(c)(1).

⁵⁶⁹ *Pan 1 Third Report and Order*, 13 FCC Rcd at 388 ¶ 18; 47 C.F.R. § 1.2110(c)(1)

⁵⁷⁰ See White Paper at 11

⁵⁷¹ See 47 C.F.R. § 74.932, 990-992. Wireless cable entities may be eligible to obtain licenses for ITFS frequencies if there are no mutually exclusive ITFS applications. 47 C.F.R. § 74.990(e).

⁵⁷² See 47 C.F.R. § 1.2110(b).

small entities serve the statutory purpose of bidding credits?⁵⁷³ We tentatively conclude that if the eligibility of parties to hold ITFS licenses is determined by their educational purpose, providing bidding credits based on the relative size of participants may not serve statutory purposes. We seek comment on this tentative conclusion.

239. In the event that participation in an ITFS auction is not significantly limited by eligibility restrictions, should our standard schedule of bidding credits should be applied to this service? In the *Part I Third Report and Order*, we adopted a standard schedule of bidding credits for certain small business definitions, the levels of which were developed based on our auction experience.⁵⁷⁴ The standard schedule appears at Section 1.2110(f)(2) of the Commission's rules.⁵⁷⁵ Are these levels of bidding credits appropriate for ITFS? Will they provide adequate opportunities for small businesses of varying sizes and for educational institutions, especially governmental and non-profit institutions, to participate in spectrum auctions that are open to a wide variety of participants.⁵⁷⁶ For this proceeding, we propose to apply this standard schedule and define an entity with average annual gross revenues not exceeding \$40 million for the preceding three years as a "small business;" an entity with average gross revenues not exceeding \$15 million for the same period as a "very small business;" and an entity with average gross revenues not exceeding \$3 million for the same period as an "entrepreneur."⁵⁷⁷ We propose to provide qualifying "small businesses" with a bidding credit of 15%, qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%. consistent with Section 1.2110(f)(2).⁵⁷⁸ We seek comment on this proposal.

240. Given the close relationship between MDS and ITFS, we invite comment on the effect of having three small business sizes, and bidding credits, in ITFS while having only one small business size (average annual gross revenues for the preceding three years not exceeding \$40 million) and one credit (15%) in MDS.⁵⁷⁹ Commenters proposing alternative business size standards should give careful consideration to the likely capital requirements for developing services in this spectrum. In this regard, we note that new ITFS licensees may be presented with issues and costs involved in transitioning incumbents and developing markets, technologies, and services. Commenters also should consider whether the band plan and characteristics of the ITFS band suggest adoption of other small business size definitions and/or bidding credits in this instance.

⁵⁷³ Cf. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report and Order and Order on Reconsideration*, WT Docket No. 97-82, FCC 00-313, 15 FCC Rcd 16266, 16288, ¶ 45 (2000).

⁵⁷⁴ See *Pan 1 Third Report and Order*, 13 FCC Rcd at 403-04, ¶ 47.

⁵⁷⁵ See 47 C.F.R. § 1.2110(f)(2).

⁵⁷⁶ See *Part 1 Third Report and Order*, 13 FCC Rcd at 404, ¶ 47.

⁵⁷⁷ See 47 C.F.R. § 1.2110(f)(2). We note that we will coordinate the small business size standards for ITFS in this proceeding with the U.S. Small Business Administration.

⁵⁷⁸ 47 C.F.R. § 1.2110(f)(2)(i)-(iii).

⁵⁷⁹ See 47 C.F.R. § 21.961(b).